# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1906.**

## No. 164.

JOHN C. HAMMOND, PLAINTIFF IN ERROR,

*vs.*

WILLIAM W. WHITTREDGE, TRUSTEE UNDER THE WILL OF SOLON O. RICHARDSON, DECEASED, ET AL.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

**FILED DECEMBER 11, 1905.**

**(20,015.)**

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States of America to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts holden at Boston within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William W. Whittredge of Wakefield in the county of Middlesex as he is trustee under the will of Solon O. Richardson deceased, plaintiff, and John C. Hammond of Northampton in the county of Hampshire, William B. H. Dowse of Newton in said county of Middlesex and Warren O. Kyle of Brookline in the county of Norfolk as they are assignees in bankruptcy of Elbridge L. Sweetser lately of Everett in said county of Middlesex and now of Provincetown in the county of Barnstable, said Elbridge L. Sweetser, Hannah Sweetser of said Provincetown, Solon O. Richardson of said Wakefield, George D. Atkins of said Newton, William P. Harding of Cambridge in said county of Middlesex, and Marquis F. Dickinson of said Brookline as he is trustee in bankruptcy of said Elbridge L. Sweetser under the law of 1898, defendants in a suit in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
1¼ of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said John C. Hammond as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifteenth day of November, in the year of our Lord one thousand nine hundred and five.

ALEX. H. TROWBRIDGE,
*Clerk U. S. Circuit Court Massachusetts District,*
By BENJ. H. BRADLEE,
*Deputy Clerk.*

Allowed by
MARCUS P. KNOWLTON,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

1½ COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

And Now, Here, the Judges of the said Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same to the Supreme Court of the United States, as within commanded.

In Testimony Whereof I, John Noble, Clerk of said Supreme Judicial Court, for said County of Suffolk, have hereto set my hand and the seal of said Court, this fourth day of December, A. D. 1905.

[SEAL.] JOHN NOBLE, *Clerk.*

2 7381. Eq.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To all Persons to whom these presents shall come, Greeting:

Know Ye, That among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of cases in Equity from the first day of January in the year of our Lord One thousand nine hundred and five, to the thirty-first day of December in said year, both days inclusive, it is thus contained:—the following being the entire record in the case:

3 COMMONWEALTH OF MASSACHUSETTS, *Suffolk County:*

Supreme Judicial Court. In Equity.

WILLIAM W. WHITTREDGE, of Wakefield, in the County of Middlesex, as he is Trustee Under the Will of Solon O. Richardson, Petitioner,

*v.*

ELBRIDGE L. SWEETSER, of Everett, in said County of Middlesex; WILLIAM B. DOWSE and WARREN O. KYLE, Both Having an Usual Place of Business in Boston, in Suffolk County, as They are Trustees in Bankruptcy of the Estate of said Sweetser Under Proceedings Instituted in 1878 A. D., and MARQUIS F. DICKINSON, JR., Having an Usual Place of Business in said Boston, as he is Trustee in Bankruptcy of the Estate of said Sweetser Under Proceedings Instituted in 1900 A. D., Respondents.

*Bill for Instructions.*

1st. Respectfully represents your said petitioner that said Solon O. Richardson died August 31, 1873, leaving a will, which was duly probated, and your petitioner was duly appointed trustee under "Item eight" of said will; that a copy in full of said will is attached hereto; that by the said will, item eight, three sisters of said Solon O. Richardson, namely, Mary A. Sweetser, Martha Hutchinson, and Louisa Hutchinson, were left certain interests in a trust fund of $35,000, established therein; and said will, item eight, further provided that—

4 "At the decease of all my three said sisters, (above named) I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my Executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever."

2nd. That the last of the said three sisters died on December 15, 1900; that the said Martha Hutchinson died leaving and having borne one child only, said child being Martha A. Whittredge, now living; that the said Louisa Hutchinson died leaving no children, and never was married; that the said Mary A. Sweetser was the last of the said sisters, and died December 15, 1900, leaving and having borne one child only, a son, the said respondent Elbridge L. Sweetser.

3rd. That the said Martha A. Whittredge and Elbridge L. Sweetser were in being at the time of the death of said Solon O. Richardson.

4th. That said Elbridge L. Sweetser filed a voluntary petition in bankruptcy in the district court of the United States, district of Massachusetts, in A. D. 1878, and was in the same year adjudicated a bankrupt, and the respondents said William B. Dowse and Warren O. Kyle are assignees of said Sweetser, bankrupt, appointed by said district court under said proceedings instituted in said year 1878.

5th. That said Sweetser filed on November 26, 1900, a second

voluntary petition in bankrupcty in said district court, and was, on said November 26, adjudicated a bankrupt, and the respondent Marquis F. Dickinson, Jr., was appointed by said district court trustee of the estate of said Sweetser, bankrupt, under said proceedings of 1900 A. D.

6th .That the above-named respondents are all the parties to your petitioner known to have, or to claim to have, any interest in the estate of said Sweetser, and to said Sweetser's interest in said fund.

7th. And your petitioner further represents that each of the said respondents have made demand upon him for the payment to them of one half of said fund, and claim to be entitled to said one half of said fund, as follows: Said Elbridge L. Sweetser claims that his interest in said fund until the death of his said mother was contingent, and that upon his said mother's death, she being the last of said sisters of said Solon O. Richardson, his interest then became vested in him.

8th. Said trustees in bankruptcy claim that the interest of said Sweetser in said fund was vested upon the death of said Solon O. Richardson, and the allowance of his will, and passed to the said trustees in bankruptcy by virtue of said bankruptcy proceedings.

9th. That your petitioner has no adequate means which will effectually protect him from future liability of determining to which of the said respondents said one half of said fund should be paid.

5 & 6 Wherefore he brings this his bill for instructions and prays this honorable court, first, for instruction as to whether said Sweetser's interest in said fund prior to his said mother's death was a vested or a contingent interest; second, for instruction as to the disposition he shall make of said Sweetser's interest in said fund.

WILLIAM W. WHITTREDGE,
By His Attorney, M. E. CLEMONS.

Filed February 1, 1901.

[For Exhibit 1, see Exhibit 1 annexed to Agreed Facts.]

7 This Bill for Instructions was filed and entered in our said Court, on the first day of February, A. D. 1901, and a subpœna was thereupon issued (as follows, to wit:)—which is not on file.

8 The petitioner appeared by M. E. S. Clemons, Esquire, his attorney, and on the sixth day of said February, said respondent Dickinson appearing by Dickinson, Farr and Dickinson, Esquires, his attorneys, filed his answer, as follows, to wit:

9 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity. No. —.

WILLIAM W. WHITTREDGE
*v.*
ELBRIDGE L. SWEETSER ET ALS.

*Answer of Defendant Marquis F. Dickinson, Jr.*

And now comes Marquis F. Dickinson, Jr., one of the defendants in the above entitled cause and for answer to the plaintiff's bill of complaint, says that he is the trustee in bankruptcy duly appointed, of the estate of Elbridge L. Sweetser, and as such trustee in bankruptcy he claims to be entitled to one half of the trust fund held by the plaintiff as alleged in said bill of complaint. And further answering he admits the allegations of the plaintiff's bill and submits his rights and interests, as Trustee in Bankruptcy as aforesaid, in the premises, to the determination of this Honorable Court.

By His Solicitors, DICKINSON, FARR & DICKINSON.

Filed Feb. 6, 1901.

10 And said respondents Dowse and Kyle, Assignees in bankruptcy, appeared by W. O. Kyle, Esquire, their attorney, and on the eighth day of said February, filed their answer, as follows, to wit:

11 *Answer of William B. H. Dowse and Warren Ozro Kyle, Assignees in Bankruptcy of Elbridge L. Sweetser.*

And now come William B. H. Dowse and Warren Ozro Kyle, assignees in bankruptcy of Elbridge L. Sweetser, and for answer say,—

1. That they admit the truth of the allegations of fact contained in the first, second, and third paragraphs of the plaintiff's bill or petition.

2. That the defendant Elbridge L. Sweetser, on the 23d
12 day of February A. D. 1878, filed his petition in the district court of the United States for the district of Massachusetts to obtain the benefit of the acts of Congress relating to bankruptcy, and thereupon surrendered all his estate and effects for the benefit of his creditors and prayed said court that he might be adjudged by said court to be a bankrupt within the purview of said acts of Congress, and that he might be discharged from all his debts provable under the same.

3. That said district court, upon consideration of said petition, duly adjudicated said Sweetser a bankrupt and duly appointed assignees of his said estate the defendant William B. H. Dowse and one Horace P. Dibble, and on the 23d day of March A. D. 1878 made an assignment to said assignees, a copy whereof is hereto annexed.

4. That on the 16th day of December A. D. 1882 said Dibble, with the consent of the judge of said district court, resigned his trust and was discharged therefrom, and upon the same day, to wit, December 16, 1882, the said court appointed the defendant Warren Ozro Kyle to be assignee of said estate of said Elbridge L. Sweetser; and thereupon the said estate of the said debtor vested in the defendants William B. H. Dowse and Warren Ozro Kyle, with the same powers and duties relative thereto as if originally chosen.

5. That by virtue of said assignment and said proceedings in said district court of the United States the interest of the said Elbridge L. Sweetser under the will of Solon O. Richardson, set forth and described in the bill or petition for instructions, vested in the defendants William B. H. Dowse and Warren Ozro Kyle, assignees in bankruptcy of the said Elbridge L. Sweetser as aforesaid.

6. That in said bankruptcy proceedings debts were proven to the amount of $20,000; that no dividend was ever paid to the creditors of said estate and no portion of said debts has ever been paid; but a discharge from all debts provable as aforesaid was granted to the said Elbridge L. Sweetser on the 6th day of August A. D. 1881.

7. That these defendants claim the interest of said Sweetser described in the plaintiff's bill or petition, and claim that one half the fund held by the plaintiff as trustee under the will of Solon O. Richardson aforesaid under "Item eight" thereof, should be paid over by the plaintiff to them, the said William B. H. Dowse and Warren Ozro Kyle, assignees in bankruptcy as aforesaid, to be held and administered by them for the uses and purposes, with the powers and limitations, set forth in said acts of Congress under which said estate and property vested in them as such assignees.

And further answering, these defendants deny all the allegations and claims in the bill or in any answer contained inconsistent with the allegations and claims herein set forth.

WILLIAM B. H. DOWSE,
By His Attorney, WARREN OZRO KYLE.
WARREN OZRO KYLE.

Filed February 8, 1901.

13 & 14 [*Copy of Assignment in Bankruptcy In re E. L. Sweetser.*]

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Massachusetts.

In the Matter of ELBRIDGE L. SWEETSER, Bankrupt. In Bankruptcy.

DISTRICT OF MASSACHUSETTS, *ss:*

Known All Men By These Presents that William B. H. Dowse of Boston in the County of Suffolk and Horace P. Dibble of Northampton in the County of Hampshire and State of Massachusetts in

said District, have been duly appointed Assignees in said matter. Now therefore I, Edgar J. Sherman, Register in Bankruptcy of said District by virtue of the authority vested in me by the Acts of Congress relating to Bankruptcy throughout the United States do hereby convey and assign to the said William B. H. Dowse and Horace P. Dibble Assignees as aforesaid, all the Estate, Real and Personal of the said Elbridge L. Sweetser, Bankrupt aforesaid, including all the property of whatever kind of which he was possessed, or in which he was interested, or entitled to have on the twenty-third day of February A. D. 1878 with all his Deeds, Books and Papers relating thereto, excepting such property as is exempted from the operation of this Assignment by the provisions of said Acts.

To Have and to Hold all the foregoing premises to the said William B. H. Dowse and Horace P. Dibble and their heirs forever. In Trust Nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations set forth in said Acts.

In Witness Whereof, I, the said Register, have hereunto set my hand and caused the seal of said Court to be affixed, this twenty-third day of March in the year of our Lord one thousand eight hundred and seventy-eight.

EDGAR J. SHERMAN,
[SEAL.] *Register in Bankruptcy.*

15 And said respondent, Elbridge L. Sweetser, appeared by Willis W. Stover, Esquire, his attorney, and filed his answer, on said eighth day of February, as follows, to wit:

16 & 17 *Answer of the Respondent Elbridge L. Sweetser.*

And now comes Elbridge L. Sweetser, one of the respondents in the above-entitled cause, and for answer to the petitioner's bill for instructions admits all the allegations, facts, and statements in said bill for instructions contained.

And for further answer, the said respondent Elbridge L. Sweetser says that he is advised and believes, and will maintain, that the interest in dispute, to wit, one half of the trust fund of $35,000 established in the will of Solon O. Richardson as exhibited by the petitioner's bill for instructions, was a contingent interest up to the time of the death of the last surviving beneficiary, Mary A. Sweetser, who died December 15 A. D. 1900; and as a contingent interest should not by law pass to the respondent's assignees in bankruptcy under the proceedings instituted in 1878, nor to the respondent's trustee in bankruptcy under the proceedings instituted in 1900, but that said interest became vested on December 15 A. D. 1900, subsequently to both adjudications of bankruptcy, and should accordingly be turned over to the respondent Elbridge L. Sweetser.

And your respondent submits his rights and interest in the premises to the determination of this honorable court.

By His Solicitor, WILLIS W. STOVER.

Filed February 8, 1901.

18 And on the twentieth day of said February, John C. Hammond appearing by H. R. Bailey, Esquire, his attorney, filed his motion to be admitted as a party defendant in said suit, as follows, to wit:

19 *Motion of John C. Hammond to be Admitted as a Party in the Suit.*

And now comes John C. Hammond of Northampton in the county of Hampshire and commonwealth aforesaid, and says that Elbridge L. Sweetser, one of the defendants in the above-entitled cause, by an instrument in writing dated October 24, 1885, a copy of which is ready to be produced in court, assigned his interest in the trust fund created by the will of Solon O. Richard-
20 son to the Monitor Oil Stove Company to secure the repayment to said Monitor Oil Stove Company of the sum of eighteen hundred and nine dollars ($1809); that he, the said John C Hammond, is the owner by mesne conveyances of said assignment and the interest therein conveyed and the claim thereby secured.

Wherefore he prays to be admitted as a party to this suit, and claims to be entitled to the trust fund in controversy, subject to the rights of the assignees in bankruptcy of said Sweetser.

By His Attorney, HOLLIS R. BAILEY.

Filed, allowed per order of Lathrop, J., February 20, 1901.

21 Which motion, by consent of parties, was allowed by our said Court; and said respondent Hammond thereupon filed his answer, as follows, to wit:

22 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

No. —.

WILLIAM W. WHITTREDGE
*vs.*
ELBRIDGE L. SWEETSER ET AL.

*Answer of John C. Hammond.*

This defendant admits the allegations of the plaintiff's bill of complaint.

And further answering this defendant says that he is the owner and holder by written mesne conveyance of a claim of $1809. and interest and of an assignment in writing by said Elbridge L. Sweetser dated October 24, 1885 whereby said Sweetser assigned all his interest in the trust fund in question to the Monitor Oil Stove

Company to secure the payment of said $1809 and interest, that no part of said sum of $1809 and interest has been paid and this defendant claims the said trust fund or so much thereof as may be necessary to pay to him said sum of $1809 and interest thereon from October 24, 1885.

23 Wherefore this defendant submits his rights to the determination of this Honorable Court.

By His Solicitor, HOLLIS R. BAILEY.

Filed Feb. 20 1901.

24 And said respondent Hannah Sweetser also appeared by G. A. Brown, Esquire, her attorney, and filed her answer, as follows, to wit:

25 *Answer of Respondent Hannah Sweetser.*

And now comes Hannah Sweetser, respondent in the above-entitled cause, and for answer to the plaintiff's bill of complaint says that,—

1. She admits the truth of the allegations, facts, and contents in the 1st, 2d, 3d, 4th, and 5th paragraphs in the plaintiff's said bill or petition.

2. As to the allegations in the 6th, 7th, 8th, and 9th paragraphs, she neither admits nor denies, and submits her rights and intertest, so far as affected by said allegations, to the determination of this honorable court.

6 3. And further answering she says that after the adjudication of the bankruptcy of the said Elbridge L. Sweetser, as alleged in paragraph 4, and before the second adjudication of the bankruptcy of the said Elbridge L. Sweetser, as alleged in paragraph 5, to wit, on the 24th day of October A. D. 1885, all the right, title, and interest in and to any and all of the trust prperty under the will referred to in paragraph 1 of said bill was duly assigned by the said Elbridge L. Sweetser to one Sidney P. Brown and by the said Sidney P. Brown, on the same day, duly assigned to her, as per copies marked A and B hereto annexed, and to which reference is hereby made, subject only to the incumbrances or conditions referred to in said two assignments, which incumbrances and conditions more fully appear in the copy of the assignment from said Elbridge L. Sweetser to the Monitor Oil Stove Company *et al.*, a copy of which is hereto annexed marked A.

4. And the said Hannah Sweetser further answering says that the amount of claims proven against the estate of said Elbridge L. Sweetser in the first bankruptcy proceedings, to wit, those of 1878, amounted only to $13,000 (thirteen thousand dollars) and that a large portion of said claims so proven have been subsequently settled in full by the said Elbridge L. Sweetser.

5. And that the debts described in the assignment marked C, from said Elbridge L. Sweetser to the Monitor Stove Company *et al.*, have been paid in full.

6. Wherefore, the said Hannah Sweetser claims that she is entitled to one half of the trust fund held by the plaintiff, as alleged in the said bill of complaint.

7. She also further represents that a bill in equity was brought in September, 1882, in the United States district court for the district of Massachusetts (Horace P. Dibble *et al.*, Assignees, *v.* Elbridge L. Sweetser *et al.*), in which the said assignees, as per copy hereto annexed marked D, pray that the said Elbridge L. Sweetser be ordered and directed to execute and deliver such instrument or instruments as will convey to them, the said assignees, all such property, right, title, or interest, as he, the said Elbridge L. Sweetser, then had as legatee under the will of said Solon O. Richardson, and that the said bill in equity is still pending in said United States district court and no hearing has ever been had thereon. That the statute of limitations has run as against the said assignees, both in said equity case and as to any standing in this case.

And she submits her rights and interests in the premises to the determination of this honorable court.

By Her Solicitor, GEORGE A. BROWN.

Filed February 20, 1901.

(For Exhibits A, B, and C, see Exhibits 3, 4, and 5 annexed to Agreed Facts.)

27 D.

No. 40.

United States District Court, District of Massachusetts.

HORACE P. DIBBLE ET AL., Assignees,
*vs.*
ELBRIDGE L. SWEETZER and SOLON O. RICHARDSON.

To the Honorable Thomas L. Wilson, Judge of the District Court of the United States for the District of Massachusetts, sitting in equity.

Respectfully represents Horace P. Dibble and W. B. H. Dowse that Elbridge L. Sweetzer, a citizen of Everett, in the County of Middlesex in said District, filed his petition in bankruptcy in said District Court and was thereon adjudicated a bankrupt on or about February 23rd, A. D. 1878; that your orators were duly chosen and appointed assignees of the estate of said Sweetzer and accepted said trust, and that all the estate, real and personal of the said Sweetzer became vested in your orators by virtue of the assignment of said District Court, dated on or about —— A. D. 1878; that your orators bring this their Bill of Complaint against Elbridge L. Sweetzer, bankrupt, aforesaid, and Solon O. Richardson, of Wakefield, in Middlesex County in said District, as such trustee under the will of Solon O. Richardson, late of Wakefield, deceased, testate, and thereupon

your orators say that the said Sweetzer has a property right, title or interest as legatee under the will of the said Solon O. Richardson, deceased, which he, the said Sweetzer did not set forth under his schedule of property filed at the time of the filing of his said petition in bankruptcy in said District Court: that the said right, title or interest as legatee by said Sweetzer had accrued and vested in said Sweetzer before the date of his filing his said ptition in bankruptcy, as aforsaid, and was by operation of the United States Bankruptcy Act of 1867 and Amendments thereto, transferred and assigned to your orators, aforesaid: that your orators had no knowledge until within a few days last past of the said property right, title or interest of the said Sweetzer as legatee under said will: that your orators have always acted with promptness and diligence in the settlement of said estate in all matters within their knowledge; and your orators further say that on the ninth day of September, A. D. 1869 said Solon O. Richardson, deceased, made his last will and testament; that said Solon O. Richardson died on the thirty-first day of August, A. D. 1873; that on the seventh day of October of the same year the said will was proved and allowed by the Court of Probate for the County of Middlesex in said District; that among the other provisions of said last will and testament—as will more fully appear by reference to the certified copy thereof hereto annexed—said testator bequeathed the sum of thirty-five thousand dollars to trustees
28 to be invested as directed therein and provided that the income thereof should be divided to share equally and pay semi-annually to three sisters of the deceased, to wit:—Mary A. Sweetzer, Martha Hutchinson and Louise Richardson during their respective lives and that upon the decease of either of said three sisters the share allotted to her as aforesaid should be paid to the children of said deceased sister during the lives of said sisters surviving and that upon the decease of the three said sisters the said fund of thirty-five thousand dollars should be divided equally between the children of said sisters and the fund paid to said children; and your orators further say:—that the said Eldridge L. Sweetzer is the son and only child of said Mary A. Sweetzer and your orators are informed and believe and therefore aver that the said Mary A. Sweetzer, Martha Hutchinson and Louise Richardson are still living; and there is one child of one of the said sisters besides the defendant Elbridge L. Sweetzer; that these persons comprise all who are beneficially interested in said trust fund or the income thereof and that the property right, title or interest of said Elbridge L. Sweetzer as aforesaid is of great value; and your orators further say that in and by said will the testator appointed as trustees William Morton and Susan Richardson, who executed said trust and continued to act as trustees until the death of Susan Richardson; that Solon O. Richardson the defendant was thereupon appointed as trustee in the place of said Susan Richardson deceased, by the act of the Probate Court of said County of Middlesex on the eighteenth day of January, A. D. 1876 and that he accepted said trust and upon the seventh day of March, A. D. 1881 said William Morton Trustee resigned; that his resignation was received and that he transferred thereupon all the said trust funds in his hands and all his interest therein unto the

said Solon O. Richardson the defendant who is now the sole trustee of said fund of thirty-five thousand dollars; and your orators further say that by virtue of the said United States Bankruptcy Law and its Amendments, your orators are entitled to have the interest of said Sweetzer in said trust property assigned and conveyed to them and their title thereto confirmed and established; and that your orators are entitled to the order of this Honorable Court as a Court of Equity in that behalf.

Wherefore your orators pray that said Elbridge L. Sweetzer may be ordered and directed to execute and deliver such instrument or instruments as will convey to your orators, Assignees, as aforesaid, all such property right, title or interest as legatee in and to said devise under the will of said Solon O. Richardson, deceased, as he may have: that said Solon O. Richardson, trustee, may be enjoined from paying to the said Elbridge L. Sweetzer or any person or persons claiming under him, during the pendency of this suit, any part of said fund or the income thereof which may accrue or become payable as aforesaid to said Elbridge L. Sweetzer or his legal representatives and to grant your orators such other and further relief in the premises as the nature of the case may require and to your Honor shall seem meet, to the end, therefore, that your orators
29 & 30 may have specified and required relief if it please your Honor to grant unto your orators not only your writ of injunction to be directed to the said Solon O. Richardson, Trustee, restraining him from transferring or paying over while these proceedings are pending to said Elbridge L. Sweetzer or any person or persons claiming under him any part of said trust fund now in his hands or any part of the income thereof which has accrued or may hereafter accrue and become payable to said Elbridge L. Sweetzer or his legal representatives during the pendency of this suit, but also a subpœna directed to said Solon O. Richardson, Trustee, and said Elbridge L. Sweetzer thereby commanding them and each of them at a certain time and under a certain penalty therein limited to appear before your Honor in this Honorable Court and then and there full, true, direct and perfect answers make, but not under oath, to all and singular the premises and further to assent to perform and abide until further order, direction and decree therein as to your Honor shall seem meet.

H. P. DIBBLE,
By W. B. H. DOWSE,
WM. B. H. DOWSE,
*Assignees of Estate of Elbridge L. Sweetzer.*
W. B. H. DOWSE,
GEO. Z. ADAMS,
*Of Counsel for Complainant.*

DISTRICT OF MASSACHUSETTS, *Suffolk, ss:*

On this 19th day of September, A. D. 1882.

Then personally appeared the above named W. B. H. Dowse and being duly sworn, on his oath said that he is one of the assignees of the estate of the said Elbridge L. Sweetzer, bankrupt named as one

of the complainants in the above Bill of Complaint; that his was full and particular knowledge of the matters stated in said Bill; that he has read the above Bill and knows the contents thereof; that the same is true of his own knowledge, except as to the matters that are therein stated to be on information and belief of the complainant and that as to those matters he has been informed and believes them to be true.

GEORGE Z. ADAMS,
*Justice of the Peace.*

31 And on the twenty-fourth day of September, in said year, Wm. P. Harding, appearing for himself, with the consent of parties filed his motion to be admitted party, as follows, to wit:

32 & 33 *Motion of William P. Harding to Come in as a Party Defendant.*

And now comes William P. Harding of Cambridge in the county of Middlesex, and says that on the 6th day of April last he filed a petition in this court in which Hannah Sweetser, wife of said Elbridge ., named in the plaintiff's bill of instructions, was made a defendant, together with said William W. Whittredge, the said trustee nder the will of said Richardson, in which petition he claims that e is a creditor of said Hannah, and that said Whittredge held the m of $17,500 in his hands, payable, under certain conditions and ualifications, to said Hannah, but which could not be come at to be tached or taken on execution in a suit at law by your petitioner gainst said Hannah; that said bill is still pending, and therefore he oves and asks that he be made a party to the present bill for inructions, and that his petition may be heard at the same time with is bill by the court.

WM. P. HARDING, *Pro se.*

Filed, by consent, September 24, 1901.

And afterwards, on the fourteenth day of April, Nineteen hundred and three, M. E. S. Clemons, counsel for plaintiff, thdrew his appearance, and the said plaintiff appeared by Hamn and Eaton, Esquires, his attorneys.

And said respondent Hammond, afterwards, to wit, on the twenty-t day of November, Nineteen hundred and four, by consent, filed motion which was allowed, to amend his answer, as follows, to :

And now comes John C. Hammond, and moves to amend his answer to the plaintiff's bill so that the same shall read follows:—

*Amended Answer.*

First. That the Florence Machine Company, a corporation organized under the laws of Massachusetts, on or about November 28, 1881, was the owner and holder of certain claims against the defendant Elbridge L. Sweetser; that among said claims were five promissory notes, all then overdue, signed by said Elbridge L. Sweetser, all payable to the order of said Florence Machine Company, amounting in the aggregate to the sum of $6112.10, not including interest.

36 Second. That thereupon the said Florence Machine Company, on or about November 28, 1881, filed a bill in equity in this court against said Elbridge L. Sweetser and against Solon O. Richardson, the then trustee under the will of Solon O. Richardson, deceased, to enforce payment of said notes and to reach and apply in payment of said notes the equitable interest of said Elbridge L. Sweetser under the will of Solon O. Richardson, deceased. A copy of said bill is hereto annexed and marked "Exhibit No. 1;" that in said suit a subpœna was duly issued, dated November 28, 1881, returnable on the first Monday of January, 1882; that said subpœna was duly served on the defendants Elbridge L. Sweetser and Solon O. Richardson on November 29, 1881. A copy of said subpœna, with the officer's return thereon is hereto annexed and marked "Exhibit No. 2;" that the attorney for said Florence Machine Company in the bringing of said suit was Warren O. Kyle, Esq.

Third. That afterwards, to wit, on or about February 1, 1882, Elbridge L. Sweetser filed an answer to said bill, a copy of which answer is hereto annexed and marked "Exhibit No. 3."

Fourth. That on or about February 1, 1882, the said Solon O. Richardson, trustee, also filed an answer to said bill, a copy of which answer is hereto annexed and marked "Exhibit No. 4;" that in and by said answer it was set forth that Elbridge L. Sweetser, on or about February 23, 1878, was adjudged a bankrupt in the United States district court in the district of Massachusetts, and that assignees were duly appointed, and suggesting that if any interest in said trust fund, legal or equitable, ever did vest in said Sweetser, such interest passed to the said assignees in bankruptcy.

Fifth. That on or about November 15, 1882, said Florence Machine Company, by its attorney, Warren O. Kyle, filed a replication in said suit, a copy of which is hereto annexed marked "Exhibit No. 5;" that afterwards, in 1882, said Warren O. Kyle was appointed in place of Horace P. Dibble as one of the assignees in bankruptcy of said Elbridge L. Sweetser, and with one W. B. H. Dowse has continued to hold that office until the present time.

Sixth. That on or about October 26, 1885, Edward O. Cooke, Esq., appeared as counsel for the defendants Elbridge L. Sweetser and Solon O. Richardson, and thereupon, on or about said October 26, 1885, said Solon O. Richardson filed a further answer, setting forth that since the bringing of the bill he had resigned his office as trustee under the will of Solon O. Richardson, and that William Morton

had been appointed sole trustee, and had accepted the trust; a copy of said additional answer is hereto annexed marked "Exhibit 6."

Seventh. That on or about August 8, 1894, said Warren O. Kyle withdrew his appearance as counsel for the plaintiff, the Florence Machine Company, in said case, and on or about the same date William A. Hayes, 2d, Esq., entered his appearance for the said plaintiff.

Eighth. That on or about August 13, 1894, the plaintiff, said Florence Machine Company, by its solicitor, William A. Hayes, 2d, filed a motion praying that Daniel G. Walton, the successor of William Morton, trustee, and the said W. B. H. Dowse and Warren O. Kyle, the assignees in bankruptcy of Elbridge L. Sweetser, might be made parties defendant and summoned to answer the plaintiff's bill. A copy of said motion is hereto annexed marked "Exhibit No. 7."

Ninth. That thereupon a subpœna was issued, dated August 14, 1894, directed to said Daniel G. Walton, trustee, and to William B. H. Dowse and to Warren O. Kyle, assignees in bankruptcy of the estate of Elbridge L. Sweetser. A copy of said subpœna and a copy of the officer's returns thereon is hereto annexed and marked "Exhibit No. 8." That service of said subpœna was made on said Daniel G. Walton on or about August 18, 1894, and service was accepted by said Dowse and Kyle, assignees, on or about August 30, 1894.

Tenth. That afterwards, on or about September 11, 1894, Charles H. Tyler, Esq., entered his appearance for the said Daniel G. Walton, trustee.

Eleventh. That afterwards, on or about October 1, 1894, said Florence Machine Company assigned to the Central Oilgas Stove Company, a corporation, all its choses in action, including its claims against the said Elbridge L. Sweetser; that afterwards, to wit, on or about October 29, 1895, said Central Oilgas Stove Company made an assignment of all its property to M. F. Dickinson, Jr., Calvin H. Hill, and Charles W. Conant as trustees or assignees for the benefit of its creditors; that afterwards, to wit, on or about November 3, 1896, said Dickinson, Hill, and Conant, assignees, sold and assigned to said John C. Hammond aforesaid all the remaining assets in their hands, including all claims against the said Elbridge L. Sweetser and including the claim sued upon in said bill in equity.

Twelfth. That afterwards, to wit, on or about May 15, 1899, said John C. Hammond entered his appearance for the plaintiff in said suit and also his appearance *pro se*, and filed a motion setting forth the said assignments to him of the claim in suit, and asking to be permitted to prosecute the said suit in his own name. A copy of said motion is hereto annexed and marked "Exhibit No. 9."

Thirteenth. That afterwards, to wit, on or about May 20, 1899, the said Warren O. Kyle and W. B. H. Dowse, filed an answer in said suit, a copy of which answer is hereto annexed and marked "Exhibit No. 10."

Fourteenth. That said suit is still pending and is now No. 386 on the equity docket of this court; that no hearing has yet been had upon the merits in said case, and the present trustee under the

will of Solon O. Richardson has not yet appeared or asked to be joined as a party defendant in said suit.

Fifteenth. And the said Hammond, further answering,
38 says that said Elbridge L. Sweetser, on his voluntary petition, was adjudged a bankrupt in the United States district court for the district of Massachusetts, February 23, 1878; that Horace P. Dibble and W. B. H. Dowse on or about March 16, 1878, were appointed assignees in bankruptcy of said Elbridge L. Sweetser, and accepted the trust, and as hereinbefore stated, the said Dowse has continued to hold that office. The said Dibble resigned in the fall of 1882 and the said Warren O. Kyle was at once appointed in his place, and has held the office ever since.

Sixteenth. That always after said bankruptcy said Elbridge L. Sweetser claimed to be the owner of said equitable interest under the will of Solon O. Richardson, and at the date of said suit brought as aforesaid, November 28, 1881, still claimed to be the owner of said interest.

Seventeenth. And further answering the said Hammond says that in 1885 the said Elbridge L. Sweetser, still claiming to be the owner of said equitable interest, and being then indebted upon promissory notes to the Monitor Oil Stove Company of Cleveland, Ohio, in the sum of $1809, and to Solon O. Richardson of Wakefield, Mass., in the sum of $506.05, on October 24, 1885, executed and delivered to the said Monitor Oil Stove Company and said Richardson a written mortgage or assignment under seal of said equitable interest, as security for the payment in six months from October 24, 1885, without priority one over the other, of said amounts due them, respectively, upon said notes as aforesaid with interest. Hannah Sweetser, the wife of said Elbridge L. Sweetser, was a joint maker on the notes and joined in said mortgage or assignment to release all her right, title, and interest in the property conveyed. A copy of said assignment or mortgage is hereto annexed and marked "Exhibit No. 11," and a copy of said note to the Monitor Oil Stove Company is annexed marked "Exhibit No. 12."

Eighteenth. That on or about July 21, 1891, the said Monitor Oil Stove Company, by a written assignment under seal, duly conveyed to the Central Oilgas Stove Company aforesaid all its property, real, personal, or mixed, of whatsoever nature or description, and wheresoever situated, including the said note and mortgage assignment given by Elbridge L. Sweetser and his wife, Hannah Sweetser.

That afterwards, as already hereinbefore stated, the said Central Oilgas Stove Company made an assignment of all its property to M. F. Dickinsin, Jr., Calvin H. Hill, and Charles W. Conant, as trustees or assignees for the benefit of its creditors; that afterrwards, to wit, on or about November 3, 1896, said Dickinson, Hill, and Conant, assignees, sold and assigned to said John C. Hammond all the remaining assets in their hands, including their claim upon said note and mortgage assignment given by Elbridge L. and Hannah Sweetser to the Monitor Oil Stove Company.

Nineteenth. That no proceedings were taken by said as-
39 signees in bankruptcy, Messrs. Dowse, Dibble, and Kyle, to dispute the equitable attachment of the Florence Machine Company aforesaid until May 20, 1899, when said Dowse and Kyle filed an answer as aforesaid in said equity suit, begun November 28, 1881, being eighteen years after said suit was begun. That said assignees in bankruptcy have never instituted any proceedings to test the validity of said mortgage assignment made by the said Sweetser to the Monitor Oil Stove Company in 1885 as aforesaid.

Twentieth. And the said Hammond, further answering, says that according to the true construction of United States Rev. Sts. sec. 5057, the said Dowse and Kyle, assignees in bankruptcy, as aforesaid, of the estate of Elbridge L. Sweetser, are barred from asserting any claim against the aforesaid equitable interest of Elbridge L. Sweetser under the will of Solon O. Richardson, either as against said Hammond, assignee of the Florence Machine Company, as aforesaid, or as against said Hammond, assignee of the Monitor Oil Stove Company, as aforesaid.

Twenty-first. And further answering said Hammond says that the said Dowse and Kyle, assignees in bankruptcy as aforesaid, by reason of their laches are not entitled to assert any title to or interest in the equitable interest of said Elbridge L. Sweetser under the will of Solon O. Richardson aforesaid, either as against said Hammond, assignee of said Florence Machine Company, or as against said Hammond, assignee of said Monitor Oil Stove Company.

By His Attorney, HOLLIS R. BAILEY.

Filed, by consent and allowed, November 21, 1904.

## Exhibit No. 1.

Commonwealth of Massachusetts, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

Florence Machine Company
*vs.*
Elbridge L. Sweetser and Solon O. Richardson.

To the Honorable the Justices of the Supreme Judicial Court sitting in equity within and for the County of Suffolk:

The Florence Machine Company of Northampton in the County of Hampshire, a corporation duly organized under the laws of this State and having a usual place of business at Boston, in
40 said County of Suffolk, brings this its bill of complaint against Elbridge L. Sweetser of Everett having his usual place of business in said Boston and Solon O. Richardson of Wakefield, having his usual place of business in said Boston, as he is trustee under the will of Solon O. Richardson, late of Wakefield,

deceased, testate; and thereupon the Plaintiff says that said Elbridge L. Sweetser made five promissory notes payable to the order of the plaintiff, copies whereof are hereto annexed, which are due and unpaid, and that said Elbridge L. Sweetser owes the Plaintiff the amount of said notes and interest thereon. And the Plaintiff further says that said Elbridge L. Sweetser, has a property, right, title or interest as legatee under the will of said Solon O. Richardson, deceased, which cannot be come at to be attached or taken on execution in a suit at law. And the Plaintiff showeth that on the ninth day of September, A. D. 1869, said Solon O. Richardson, deceased, made his last will and testament; that said Solon O. Richardson departed this life on the thirty-first day of August A. D. 1873. That on the seventh day of October of the same year the said will was proven and allowed by the Court of Probate for the County of Middlesex. That among other provisions of said last will and testament, as will more fully appear by reference to a certified copy thereof hereto annexed, said testator bequeathed the sum of Thirty-five Thousand Dollars to trustees to be invested as directed therein and provided that the income thereof should be divided and shared equally and paid semi-annually to three sisters of the deceased, to wit: Mary A. Sweetser, Martha Hutchinson, and Louisa Richardson, during their respective lives and that upon the decease of either of said three sisters the share allotted to her as aforesaid should be paid to the children of said deceased sister during the lives of said sisters surviving and that upon the decease of all said three sisters the said fund of Thirty-Five Thousand Dollars should be divided equally between the children of said sisters and should then be paid to said children. And the Plaintiff further says that said Elbridge L. Sweetser is the son and only child of said Mary A. Sweetser, and the Plaintiff is informed, believes and therefore avers that said Mary A. Sweetser, Martha Hutchinson and Louisa Richardson are still living, that there is one child of one of said sisters besides the Defendant Elbridge L. Sweetser, that these persons aforesaid comprise all who are beneficially interested in said trust fund or the income thereof, and that the property, right, title or interest of said Elbridge L. Sweetser as aforesaid is of great value. And the plaintiff further showeth that in and by said will the testator appointed as trustees William Morton and Susan Richardson who accepted said trusts and continued to act as trustee until the death of Susan Richardson. That Solon O. Richardson the Defendant was thereupon appointed to act as trustee in place of said Susan Richardson deceased by the Probate Court for said County of Middlesex on the eighteenth day of January A. D. 1876, and that he accepted said trust.

That upon the seventh day of March A. D. 1881 said
41 William Morton trustee resigned; that his resignation was accepted and that he thereupon transferred all the said trust funds in his hands and all his interest therein unto said Solon O. Richardson the Defendant who is now the sole trustee of said fund of Thirty-five Thousand Dollars.

And the Plaintiff further showeth that in justice and equity and

especially by virtue of the one hundred and thirteenth chapter of the General Statutes Section second the Plaintiff is entitled to have the interest of said Elbridge L. Sweetser in said trust property applied to the payment of the debt now due and payable from said Elbridge L. Sweetser to the Plaintiff as aforesaid and that the plaintiff is entitled to the aid of this Honorable Court as a Court of Equity in that behalf.

Wherefore the Plaintiff prays that the amount of the debt due to the plaintiff on said notes with interest thereon may be fixed and determined; that the property, right, title, or interest of said Elbridge L. Sweetser in or to said trust fund and the income thereof may be sold and that the proceeds of said sale or such part thereof as may be adequate may be applied to the payment of the debt due to the Plaintiff as aforesaid; that the said Solon O. Richardson trustee may be enjoined from paying to said Elbridge L. Sweetser or any person or persons claiming under him, during the pendency of this suit, any part of said fund or the income thereof which may accrue and become payable as aforesaid to said Elbridge L. Sweetser or his legal representatives; and to grant the Plaintiff such other and further relief in the premises as the nature of the case may require and to your Honors shall seem meet.

To the end, therefore, that the plaintiff may have the specified and required relief, may it please your Honors to grant unto the Plaintiff not only your writ of injunction to be directed to the said Solon O. Richardson trustee restraining him from transferring or paying over, while these proceedings are pending, to said Elbridge L. Sweetser, or any person or persons claiming under him, any part of said trust fund now in his hands, or any part of the income thereof which has accrued or may hereafter accrue and become payable to said Elbridge L. Sweetser or his legal representatives during the pendency of this suit; but also a writ of subpœna directed to said Solon O. Richardson trustee and said Elbridge L. Sweetser thereby commanding them and each of them at a certain time and under a certain penalty therein to be limited to appear before Your Honors in this Honorable Court and then and there full, true, direct and perfect answer make, but not under oath, to all and singular the premises and further to stand to, perform and abide such further order direction and decree therein as to your Honors shall seem meet.

FLORENCE MACHINE CO.,
By OSCAR N. KYLE, *Treas.*

42 COMMONWEALTH OF MASSACHUSETTS, *Hampshire, ss:*

NOVEMBER 26, 1881.

Then personally appeared the above named Oscar N. Kyle and being duly sworn on his oath said that he is the Treasurer of said Florence Machine Company, the corporation named as Plaintiff in the above bill of complaint and that he has full and particular knowledge of the matters stated in said bill, that he has read the above bill and knows the contents thereof, and that the same is true

of his own knowledge, except as to the matters that are therein stated to be on the information and belief of the complainant, and that as to those matters he has been so informed and believes it to be true.

Before me,

WM. H. HALE,
*Justice of the Peace.*

$2967.67. BOSTON, *June* 13, 1881.

Four months after date I promise to pay to the order of The Florence Machine Co. Twenty-nine Hundred and Sixty-seven 67/100 Dollars at First National Bank of Northampton, Mass.

Value Received.

ELBRIDGE L. SWEETSER.

$712.86/100. BOSTON, *June* 25, 1881.

Four Months after date I promise to pay to the order of Florence Machine Co. Seven Hundred Twelve 86/100 Dollars at Northampton Nat. Bank, Northampton

Value Received.

Due Oct. 25/28.

ELBRIDGE L. SWEETSER.

$900. BOSTON, *July* 5, 1881.

Four months after date I promise to pay to the order of Florence Machine Company Nine Hundred Dollars at Northampton Nat. Bank, Northampton.

Value Received.

ELBRIDGE L. SWEETSER.

$810.20. BOSTON, *July* 23, 1881.

Four months after date I promise to pay to the order of Florence Machine Co. Eight Hundred & Ten 20/100 Dollars at Northampton Nat. Bank, Northampton, Mass.

Value Received.

ELBRIDGE L. SWEETSER.

43 $721.37/100. BOSTON, *Aug. 3rd,* 1881.

Three months after date I promise to pay to the order of Florence Machine Co. Seven Hundred Twenty-one 37/100 Dollars at Northampton Nat. Bank, Northampton, Mass.

Value Received.

ELBRIDGE L. SWEETSER.

## EXHIBIT No. 2.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To Elbridge L. Sweetser, of Everett, having a usual place of business in Boston, in said County, and Solon O. Richardson, of Wakefield, having a usual place of business in said Boston, Greeting:

We command you that you appear before our Supreme Judicial Court, at the Rules to be holden at Boston within our said County of Suffolk, on the first Monday of January next, then and there to answer to a Bill of Complaint exhibited against you in our said Court by the Florence Machine Company of Northampton, a corporation duly established under the laws of this Commonwealth and having a usual place of business at said Boston, and to do and receive what our said Court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness, Horace Gray, Esquire, at Boston, the twenty-eighth day of November in the year of our Lord one thousand eight hundred and eighty one.

[SEAL.] JOHN NOBLE, *Clerk.*

SUFFOLK, *ss:*

BOSTON, *November* 29, 1881.

I this day summoned the within named Elbridge L. Sweetser and Solon O. Richardson to appear and answer as within directed by delivering to each an attested copy of the within subpœna.

HARUM MERRILL,
*Dep'ty Sheriff.*

*Fees.*

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## EXHIBIT No. 3.

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity. # 2935.

THE FLORENCE MACHINE COMPANY, IN EQ.,
*vs.*
ELBRIDGE L. SWEETSER ET AL.

*The Answer of Elbridge L Sweetser, One of the Defendants Named in the said Bill of Complaint.*

This defendant, now and at all times, saving and reserving unto himself all benefit and advantage of exception which can or may be

taken to the many errors, uncertainties, and other imperfections in said Bill contained for answer thereto or unto so much and such parts thereof as this def't is advised is or are material or necessary to make answer, says:

That he admits that the Complainant Company is a corporation duly established by law, having its usual place of business in Boston in said County; that he made five promissory notes payable to the Complainant's order, and corresponding in tenor to those annexed to the said Bill of Complaint, and that according to their tenor the said notes are overdue; but he avers upon his personal knowledge that it was understood and agreed by him with the complainant, and has been carried out in their practice and dealings with him that the Complainant should meet, assume and pay, or renew the notes given by him to the Complainant in the course of their dealings together, as and when such notes became payable, and that if the receipts of the sales of goods consigned and sent to him by Complainant were not sufficient, after he had deducted all expenses and charges of sale, and commissions and services of this def't upon being remitted to complainant's office in Northampton aforesaid, to meet and take up said notes as they became payable, such unpaid notes and balance of amount of such notes, should be renewed, and extended until the notes were finally paid and cancelled in manner and form as hereinbefore set forth; that this def't has acted in conformity with this agreement for many years and during all which time he has been acting as the general agent of the Complainant, whereby he was given by the Complainant the exclusive right to make sales in certain limited territory and this def't has spent large sums of money in introducing certain goods manufactured by the Complainant at their works in Florence so called in said Northampton, and has given all his time, attention and services for many years in so doing; that it has been the custom and habit of this def't whenever the complainant consigned and sent said manufactured goods to him, to send to the Complainant at said Florence a note corresponding to the amounts that were fixed in the invoices of said goods, which goods were and remained the property of the complainant, to be sold by him as the agent of said complainant as aforesaid, and the notes were to be met by remittances of the proceeds of sales to the Complainant as aforesaid, and this def't was not to be the owner or purchaser of said goods, and said notes so sent merely represented the amounts of said invoices of goods consigned to him for sale, and there was no other consideration given by the Complainant for said notes or renewals thereof, and he does not in equity and justice owe the Complainant the amount of said notes or any part thereof.

And this def't further answering says, upon his personal knowledge, that a short time previous to the bringing of this bill of complaint, to wit, on the 24th day of September, A D. 1881, at the Complainant's request, all the goods and chattels which were at the office in said Boston and had been consigned to him and were unsold, all the book accounts of sales of the Complainant's goods, all the furniture, fixtures, tools signs and notes taken for goods sold, and

securities thereof, together with all the cash and proceeds in hand, amounting to the sum of $3246.81 were reassigned and transferred by this def't to the Complainant, which sum in justice and equity ought to be applied by the Complainant to the taking up, meeting and cancelling of said notes set forth in said bill, and if done would reduce the amount of said notes very largely; but this def't is informed, the Complainant has neglected so to do.

And this def't further answering avers, that on the said 24th of September the Complainant modified the agreement with him hereinbefore recited so that the business at the said office in Boston should henceforth be under the immediate direction of the Complainant, and all the proceeds of the sales of the Complainant's goods should inure to the benefit of the latter, and the net profits of such sales by this def't at said office, after paying necessary expenses connected therewith, and the sum of $100 per month to this def't for salary, were then first to be applied by the Complainant to the extent of $1000 per annum toward the cancelling of the amount of said invoices as expressed in said notes, and secondly that the said annual profits over and above said $1000 per annum were to be paid to this def't and this def't assented to said modification of said agreement, and commenced to act thereunder, and has ever since in his dealings with the Complainant acted in accordance therewith, and the same is still in full force.

And this def't further answering, avers that the consideration of said modification of said agreement was that the Complainant would carry out the terms thereof until all of the sums represented by said notes were paid and said notes cancelled by the application of said $1000 per annum from the profits of the business at the office of the Complainant at said Boston, as has been done since said Sept. 24th, and if so continued the said sums would all be met from the profits of said business, and which agreement the Complainant ought in equity and good conscience to carry out, and apply said sum as aforesaid.

46 And this def't further answering says, that he admits that the other def't Solon O. Richardson is the sole trustee under his father's will, as set forth in said bill, that said three sisters or beneficiaries under said will are still alive, and in receipt of the said income from said trust fund; that Martha Hutchinson has an only daughter living, that Mary A. Sweetser, his mother has this def't as her only child living; and that Louisa Richardson is unmarried and childless; but he denies that by the true intent and meaning of the testator as expressed in said will that there is any right, title or interest legal or equitable in said trust fund which should entitle the Complainant to ask for the intervention or decree of this honorable Court to be sold or applied to the payment of the Complainant's alleged debt or any claim, as set forth in said bill, upon this def't.

And this def't denies that there is any other matter thing or cause in said Bill contained material or necessary for him to make answer which is not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied is true to his knowledge or belief—all which matters and things he is ready and willing to aver, maintain and prove, as this Honorable Court shall direct and humbly

prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ELBRIDGE LEROY SWEETSER.

WM. P. HARDING,
*Of Counsel for Defendant.*

EXHIBIT No. 4.

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

THE FLORENCE MACHINE COMPANY, IN EQ.,
*vs.*
ELBRIDGE L. SWEETSER ET AL.

*The Answer of Solon O. Richardson, One of the Defendants Named in said Bill of Complaint.*

This defendant now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be taken to the many errors, uncertainties, and other imperfections in said Bill contained, for answer thereto or unto so much and such parts thereof as this defendant is advised is or are material or necessary to make answer, answering says:

That it is true, as he is informed and believes, that the Com-
47 plainant Company is a duly organized corporation, having its usual place of business in said Boston; that he admits that said Solon O. Richardson, his father, died, leaving a will which was duly proved and allowed as set forth in said Bill, but for greater certainty, he craves leave, if it becomes necessary, to refer to the original will or a certified copy thereof; that he is now the sole trustee under said will, and holds upon the trust therein expressed the sum of thirty-five thousand dollars to be distributed according to the true intent and meaning of the testator of said will: that all three sisters or beneficiaries named in said will are still living and in receipt from him as trustee of said income; that the said other defendant Elbridge L. Sweetser is the son and only child of Mary A. Sweetser, one of said sisters; that Martha A. Whittredge is the daughter and only child of Martha Hutchinson, another of said sisters; and that Louisa Richardson the third of said sisters is unmarried and childless.

And this def't further answering says, that, upon his personal knowledge he cannot admit that said other defendant Sweetser owes the complainant, the amount of the notes set forth in his Bill; but upon his best information and belief, he avers that the Complainant has no valid existing debt or claim against said Sweetser, and that if any ever existed, it has either been paid, and satisfied, or has been discharged by operation of law, and there is now nothing due thereon.

And this def't further answering says, that he denies that by terms of said will, or the intent of the testator as expressed therein any

right, title or interest, either legal or equitable in said trust fund, ever vested in said other def't Sweetser, or will vest or be payable to him before the death of all of said sisters, and he avers that the intent and meaning of said testator were that only such children as are living at the date of the decease of all of said sisters should be entitled to receive from the trustee, said fund or any part thereof, and he should not in equity be required to pay or account for the said trust fund to any other person or persons that such children so living as aforesaid, or their heirs, nor should he be restrained from executing the intent of the testator as expressed therein.

And this def't further answering, says, that upon his best information and belief, said Elbridge L. Sweetser on or about Feb. 23d, A. D. 1878, was duly adjudicated a bankrupt on his own petition by the Judge of the United States District Court for the District of Massachusetts; that assignees were duly appointed who accepted the trust, and an assignment duly made to them, under the law, of all his estate for the benefit of his creditors including the Complainants, and therefore he avers that if any interest in said trust fund, legal or equitable ever did vest in said Sweetser such interest was, by operation of the United States Bankrupt Act passed in 1867, transferred and assigned to the said assignees of the estate of said Sweetser, and that they and not this complainant should be entitled to claim an interest in said trust fund upon the death of said sisters:

8 Wherefore this def't prays for the same benefit of objection to the maintenance of this Bill, as if taken by demurrer or plea hereto.

And this def't denies that there is any other matter, thing or cause in said Bill contained material or necessary for him to make answer unto which is not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied is true to his knowledge or belief, all which matters and things he is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

SOLON O. RICHARDSON, *Trustee.*

WM. P. HARDING,
*Of Counsel for Defendants.*

EXHIBIT No. 5.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

FLORENCE MACHINE COMPANY
*vs.*
ELBRIDGE L. SWEETSER and SOLON O. RICHARDSON.

*Replication.*

And now comes the Plaintiff in the above named suit and joins issue on the several answers of the Defendants.

By Its Solicitor, WARREN O. KYLE.

Filed Nov. 15, 1882.

EXHIBIT No. 6.

SUFFOLK, *ss:*

Supreme Court. In Equity.

FLORENCE MACHINE CO.
*vs.*
ELBRIDGE L. SWEETSER ET AL.

And now comes Solon O. Richardson one of the defendants named in said Bill of Complaint and says that since the bringing of said Bill and since answers made therein, this defendant has resigned his trust as trustee under the will of the — S. O. Richardson as
49 set forth in the plaintiff's Bill, that his resignation has been accepted, and William Morton of Newton in said County has been appointed sole trustee and has accepted said trust. Wherefore this defendant prays to be discharged and for his costs.

By His Att'y, EDWARD O. COOKE.

EXHIBIT No. 7.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

FLORENCE MACHINE COMPANY
*vs.*
ELBRIDGE L. SWEETSER and SOLON O. RICHARDSON.

Respectfully represents the Florence Machine Company that since the filing of his answer by Solon O. Richardson, Trusteee under the

will of Solon O. Richardson one of the defendants, and his supplemental answer representing that he had resigned said trust and that William Morton of Newton had been appointed in his place, it appears that the said Morton has also resigned said trust and Daniel G. Walton of Wakefield in said County of Middlesex has been appointed sole trustee and has accepted said trust.

And it further appears by the answer of the said Richardson that on or about Feb. 23rd, 1878, the said defendant Sweetser was duly adjudged a bankrupt by the Judge of the District Court of the United States for the District of Massachusetts; that assignees were duly appointed and accepted said trust, that an assignment was made to them under the Bankrupt Act of all his estate for the benefit of his creditors, including this complainant, and that the right, title, and interest in the property sought to be reached by this complainant's bill was by the operation of said Bankrupt Act transferred and assigned to said assignees.

And your complainant further represents that William B. H. Dowse and Warren O. Kyle both of Newton in said County of Middlesex have been duly appointed Assignees in Bankruptcy of the estate of the said Elbridge L. Sweetser and accepted said trust.

Wherefore your complainant prays that the said Daniel G. Walton, trustee, and the said Wiliam B. H. Dowse and the said Warren O. Kyle assignees, may be made parties defendant in this suit, and that they may be summoned to answer the allegations of said bill of complaint.

THE FLORENCE MACHINE COMPANY,
By Its Solicitor, WILLIAM A. HAYES, 2D.

50 EXHIBIT No. 8.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To Daniel G. Walton, of Wakefield, in the County of Middlesex, Trustee under the will of Solon O. Richardson, deceased; William B. H. Dowse and Warren O. Kyle, both of Newton, in said County of Middlesex, Assignees in bankruptcy of the estate of Elbridge L. Sweetser, Greeting:

We command you that you appear before our Supreme Judicial Court, at the Rules to be holden at Boston within our said County of Suffolk, on the first Monday of September next, then and there to answer to a Bill of Complaint exhibited against you and others in our said Court by the Florence Machine Company of Northampton in the County of Hampshire, a corporation duly organized under the laws of said Commonwealth and having a usual place of business at said Boston, and to do and receive what our said Court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness, Walbridge A. Field, Esquire, at Boston, the fourteenth

day of August in the year of our Lord one thousand eight hundred and ninety-four.

C. H. COOPER,
[SEAL.] *Ass't Clerk.*

MIDDLESEX, *ss:*

AUGUST 18TH, 1894.

I this day summoned the within named Daniel G. Walton to appear and answer at Court as within directed by leaving an attested copy of this subpœna at his last and usual place of abode.

SAM'L W. TUCKER,
*Deputy Sheriff.*

| | |
|---|---|
| Service | 50 |
| Copy | 1 00 |
| Travel | 80 |
| Horse &c | 1 20 |
| | $3 50 |

In the service of this precept it was necessary, and I actually used a horse and carriage 10 miles.

S. W. TUCKER,
*Deputy Sheriff.*

51 BOSTON, *Aug.* 30, 1894.

We hereby accept service of within subpœna.

WILLIAM B. H. DOWSE AND
WARREN O. KYLE,
*Assignees in Bankruptcy of Elbridge L. Sweetser,*
By W. O. KYLE.

EXHIBIT No. 9.

SUFFOLK, *ss:*

Supreme Judicial Court.

MAY, 1899.

386.

FLORENCE MACHINE CO.
*vs.*
ELBRIDGE L. SWEETSER ET AL.

*Motion to Amend.*

And now comes the plaintiff—and also John C. Hammond of Northampton Massachusetts who appears for the above named plaintiff and in his own behalf and shows to the Court,

That the above named plaintiff duly assigned the claim in Suit to the Central Oilgas Stove Company—a corporation doing business in

Northampton Massachusetts—and said last named corporation, duly assigned the same to M. F. Dickinson Jr. of Boston Calvin H. Hill of Chicago Ill. and Charles W. Conant of Gardner Mass.— Said last named assignees duly assigned the same to the above named John C. Hammond who is the sole owner of said claim in suit— He therefore moves the Court that the plaintiff's bill be amended and that he may now come in as the sole party in interest as plaintiff and be permitted to prosecute the same in his own name.

FLORENCE MACHINE CO.,
By JOHN C. HAMMOND, *Attorney.*
JOHN C. HAMMOND, *Pro Se.*

52 EXHIBIT No. 10.

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

THE FLORENCE MACHINE COMPANY
*vs.*
ELBRIDGE L. SWEETSER ET AL.

*The Answer of Warren O. Kyle and W. B. H. Dowse, Summoned as Defendants.*

The defendants answering say:—

That the said defendant Elbridge L. Sweetser on or about Feb. 23rd, A. D. 1878, was duly adjudicated a bankrupt on his own petition by the Judge of the U. S. District Court for the District of Massachusetts, and thereafter to wit, on the 18th day of March, 1878, Horace P. Dibble and William B. H. Dowse were duly appointed assignees of said bankrupt and accepted said trust. That an assignment was duly made to them under the law of all of said bankrupt estate for the benefit of his creditors. That thereafter, to wit, about the 29th day of August, A. D. 1882, said Horace P. Dibble resigned said trust and that by a decree of said Court of December 16th, 1882, the defendant the said Warren O. Kyle was duly appointed assignee in his place. That they are informed and believe that said defendant Sweetser had at the time of the assignment above referred to a vested interest in the trust fund under the will of Solon O. Richardson named in said Bill of Complaint and that by the operation of the United States Bankrupt Act said interest has been transferred and assigned to them, wherefore they claim the same.

And as to all other allegations in said plaintiff's bill they are ignorant and can neither admit nor deny the same, wherefore they pray that they may be hence dismissed with their costs.

WARREN OZRO KYLE.
WM. B. H. DOWSE.

[For Exhibit 11, see Exhibit 3 annexed to Agreed Facts.]

EXHIBIT No. 12.

(Copy of Copy Made by Henry Wheeler Feb. 14, 1889).

$1809. BOSTON, *Oct. 24th*, 1885.

For value received we Elbridge L. Sweetser and Hannah Sweetser promise to pay to the Monitor Oil Stove Company or order the sum of Eighteen hundred nine dollars x/100 in six months from this date with interest to be paid semi-annually at the rate of six per-
53 centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid.

ELBRIDGE L. SWEETSER.
HANNAH SWEETSER.

Signed in presence of
EDWARD O. COOKE.

Secured by mortgage to be recorded in Registry of Deeds.

54 And subsequently M. E. S. Clemons files a re-entry of appearance as follows:

Supreme Judicial Court.

WILLIAM W. WHITTREDGE, Trustee,
*v.*
ELBRIDGE L. SWEETSER ET AL.

The Clerk will enter my appearance as counsel for the plaintiff.
M. E. S. CLEMONS,
15 *Court Square, Boston.*

And Hamilton and Eaton thereupon withdrew.

55 And on the twenty-ninth day of said November, Solon O. Richardson apearing by C. H. Tyler, B. C. Parsons, and B. D. Parker, Esquires, his attorneys, filed his motion to be admitted party respondent, and to file answer, as follows, to wit:

56 *Motion of Solon O. Richardson to Be Made a Party Respondent and to File Answer.*

Now comes Solon O. Richardson of Wakefield in the county of Middlesex and commonwealth of Massachusetts, and moves that he may be made a party respondent in the above-entitled cause, and may be allowed to file the answer hereto annexed.

By His Attorneys, C. H. TYLER,
B. C. PARSONS,
B. D. BARKER.

*Answer of Solon O. Richardson.*

Now comes Solon O. Richardson, one of the respondents in the above-entitled cause, and for answer admits the allegations set forth in the first, second, third, fourth, and fifth paragraphs of the petitioner's bill for instructions; and further answering says,—

I. That on or about October 24, 1885, the said Elbridge L. Sweetser, claiming to be the owner of said equitable interest under the will of Solon O. Richardson, as set forth in the bill for instructions, and being then indebted to this respondent, gave to this respondent a promissory note, a copy of which is hereto annexed marked A, in the principal sum of five hundred six and 5/100 dollars ($506.05) payable six (6) months after date with interest at six (6) per cent. per annum until paid.

II. That on said October 24, 1885, said Elbridge L. Sweetser executed to this respondent and to Monitor Oil Stove Company of Cleveland, Ohio, a written mortgage or assignment under seal of said equitable interest, a copy of which is hereto annexed and marked B, as security for the payment in six (6) months from October 24, 1885, without priority, one over the other, of the amounts due them, respectively, upon notes dated October 24, 1885.

III. That Hannah Sweetser, the wife of said Elbridge L. Sweetser, was a joint maker of the note given to this respondent, and joined in said mortgage or assignment to release all her right, title, and interest in the property conveyed.

57 IV. That suit was brought by this respondent against said Sweetser, upon said note, and another note for one hundred twenty-five dollars ($125) in the Superior Court for Middlesex county, and on March 1, 1897, judgment was, by agreement, recovered in the sum of eight hundred ninety-one and 25/100 dollars ($891.25) damages, and eleven and 12/100 dollars ($11.12) costs, and on May 25, 1897, execution was issued for the sum of $902.37.

V. That this respondent still holds said execution, but that the same has never been satisfied, in whole or in part.

By His Attorneys, C. H. TYLER,
B. C. PARSONS,
B. D. BARKER.

Filed, by consent, November 29, 1904.

A.

$506.05/100. BOSTON, *Oct. 24th,* 1885.

For value received, we, Elbridge L. Sweetser and Hannah Sweetser promise to pay to Solon O. Richardson or order, the sum of Five Hundred six Dollars 05/100 in six months from this date, with interest to be paid semi-annually at the rate of six per centum per annum during said term, and for such further time as the said principal sum, or any part thereof, shall remain unpaid.

ELBRIDGE L. SWEETSER.
HANNAH SWEETSER.

Signed in presence of
EDWARD O. COOKE.

(For Exhibit B, see Exhibit 3 annexed to Agreed Facts.)

58 And said respondent Dickinson, Trustee, by consent of parties, filed his motion to amend his answer also, as follows, to wit:

59 & 60 *Motion of Defendant Marquis F. Dickinson, Trustee, to Amend His Answer.*

And now comes Marquis F. Dickinson, trustee, one of the defendants in the above-entitled cause, and moves to amend his answer to the plaintiff's bill of complaint so that the same shall read as follows:—

Amended Answer.

The defendant Marquis F. Dickinson, trustee in bankruptcy of Elbridge L. Sweetser under a second bankruptcy, for answer to the plaintiff's bill says as follows:—

First. He admits the allegations of fact contained in the plaintiff's bill.

Second. He says that as the trustee in bankruptcy, duly appointed, of the estate of said Elbridge L. Sweetser under the second bankruptcy, he claims to be entitled to one half of the trust fund held by the plaintiff as set forth in said bill of complaint.

Third. He claims that, according to the true construction of the United States Rev. Sts. sec. 5057, the said defendants Dowse and Kyle, assignees in bankruptcy of the estate of Elbridge L. Sweetser under the first bankruptcy, are barred from asserting any claim against the aforesaid equitable interest of Elbridge L. Sweetser under the will of Solon O. Richardson, by reason of their delay in instituting proceedings to establish their rights in the matter of said equitable interest, and that said statute is a complete bar to any claim which said Dowse and Kyle may have to said property.

Fourth. He is not informed as to what rights John C. Hammond may have as assignee of the Monitor Oil Stove Company and the Florence Machine Company, or as to what rights Hannah Sweetser may have, or as to what rights Solon O. Richardson or any other persons claiming under Elbridge L. Sweetser may have, and says that he does not admit that they have any valid claim to said property, and leaves it for them to establish the validity of their claims.

Fifth. He says that if it should be found that said Hannah and Solon O. Richardson and others claiming under Elbridge L. Sweetser have no valid claims to said property, that he, as the assignee of said Sweetser under the second bankruptcy, is entitled to said property and in any event is entitled to any surplus remaining after paying the said Solon O. Richardson and others having valid assignments from Elbridge L. Sweetser.

MARQUIS F. DICKINSON,
*Trustee in Bankruptcy.*

Filed, by consent, November 29, 1904.

61 Which motion to amend was allowed: and on the ninth day of December, in said year, upon hearing, the motion of said Solon O. Richardson, to be made party, was allowed.

Thereupon, George D. Atkins appeared by C. A. Read, Esquire, his attorney, and on the sixteenth day of said December, filed his petition to intervene, as follows, to wit:

62 & 63 *Petition of George D. Atkins to Intervene.*

George D. Atkins of Newton in the county of Middlesex and commonwealth aforesaid brings this his petition to the honorable the justices of the Supreme Judicial Court sitting in equity in said county of Suffolk, and thereupon the petitioner says,—

I. That on March 10, 1886, Elbridge L. Sweetser and Hannah Sweetser, respondents in this suit, made a mortgage assignment under seal, assigning to him all their interest under the will of Solon O. Richardson, refered to in the bill, to secure payment of $400 and interest, as stated in a witnessed promissory note signed by them on the same day, payable on demand.

II. The petitioner is advised that for his protection he should intervene and become a party hereto, and have notice of all proceedings which may be taken herein. The petitioner therefore prays that by proper order of this court he may be permitted to intervene in this suit, and be made a party hereto, and that he may have such further order of relief as may be just, and to this honorable court may seem meet.

And your petitioner, as in duty bound, will ever pray.

By His Solicitor, CHESTER A. REED.

Filed, by consent, December 16, 1904.

64 And said petition upon hearing being allowed by our said Court, said respondent Atkins filed his answer, as follows, to wit:

65 & 66 *Answer of George D. Atkins.*

I. This defendant admits the allegations of fact in the bill.

II. He says that on March 10, 1886, Elbridge L. Sweetser and Hannah Sweetser, respondents in this suit, made and delivered to him a mortgage assignment under seal of all their interest under the will of Solon O. Richardson, referred to in the bill, to secure payment of $400 and interest, as stated in a witnessed promissory note payable on demand, signed by them on the same day.

III. No payments have ever been made on account of said note.

IV. Said defendant claims whatever interest said Elbridge L. and Hannah Sweetser, or either of them, may have had under said will of Solon O. Richardson on March 10, 1886, as security for the principal of said note, and interest thereon.

GEORGE D. ATKINS,
By His Solicitor, CHESTER A. REED.

Filed, by consent, December 16, 1904.

67 Whereupon the plaintiff appearing by M. E. S. Clemons, Esquire, his attorney, joined issue on said answers of respondents, as follows, to wit:

68 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

WILLIAM W. WHITTREDGE
*v.*
ELBRIDGE L. SWEETSER ET AL.

*Replication.*

Now comes the said plaintiff and joins issue on the answers of the several respondents.

By His Attorney, M. E. S. CLEMONS.

69 And on the twenty-first day of said December, the parties filed certain Agreed facts, as follows, to wit:

70 *Agreed Facts.*

In the above-entitled cause the following facts are agreed:—Solon O. Richardson, mentioned in the plaintiff's bill, died August 31, 1873, leaving a will which was duly admitted to probate in Middlesex county, October 7, 1873. A copy of said will is hereto annexed and marked "Exhibit No. 1." Said testator left a sufficient amount of property to satisfy the provisions of item 8 of
71 the will. In and by said will the testator appointed as trustees William Morton and Susan Richardson, who accepted said trust and were duly appointed trustees, and continued to act as such trustees until the death of the said Susan Richardson. The three sisters of said Solon O. Richardson mentioned as beneficiaries in the 8th clause of his said will, to wit, Mary A. Sweetser, Martha Hutchinson, and Louisa Richardson, all survived him, and since his death have deceased. Said Martha Hutchinson had as her only child a daughter, Martha A, born before the death of the testator, and now the wife of the plaintiff, William W. Whittredge. The said Mary A. Sweetser had as her only child a son, namely, the respondent Elbridge L. Sweetser, who was born before the death of the testator, is now living, and one of the respondents in this case. Louisa Richardson never had any children. Solon O. Richardson, son of the testator, was appointed trustee in place of said Susan Richardson, deceased, on January 18, 1876, and accepted said trust.

On February 23, 1878, said Elbridge L. Sweetser filed a voluntary petition in bankruptcy in the district court of the United States, district of Massachusetts, and was on the same date adjudged a bankrupt. On March 16, 1878, William B. H. Dowse, Esq., and

Horace P. Dibble, were appointed assignees in bankruptcy of the estate of said Elbridge L. Sweetser, and on March 23, 1878, received an assignment in writing in the usual form, duly executed by the register in bankruptcy under the seal of the court, conveying to them all the estate which the bankrupt owned or was entitled to on February 23, 1878.

During the year 1878 claims amounting to about $13,940.47 were proved against said estate in bankruptcy, and no other claims have since been proved.

The only assets disclosed by said Sweetser in his schedules in said bankruptcy consisted of a stock of goods subject to a mortgage. The proceeds of these goods were used in paying the mortgage thereon and sundry expenses of the assignees, and the balance of about $280 was paid to the assignees on acount of services. The interest of said Elbridge L. Sweetser, under the said will of Solon O. Richardson was not mentioned or referred to in his schedules in bankruptcy. No dividend had ever been paid to creditors. The bankrupt, said Elbridge L. Sweetser, August 6, 1881, was granted his discharge.

The Florence Machine Company, on or about November 28, 1881, was the owner and holder of certain claims against the said Elbridge L. Sweetser, among which claims were five (5) promissory notes, all then overdue, signed by said Elbridge L. Sweetser, all payable to the order of said Florence Machine Company, amounting in the aggregate to the sum of $6112.10, not including interest. Copies of said five notes are shown in Exhibit 2, hereto annexed. Thereupon the said Florence Machine Company, on November 28, 1881, filed a bill in equity in this court against the said Elbridge L. Sweetser and against Solon O. Richardson, then the sole trustee under the will of Solon O. Richardson, deceased, to enforce the payment of said notes and to reach and apply in payment
72 of said notes the equitable interests of said Elbridge L. Sweetser under the will of said Solon O. Richardson, deceased. Said suit was brought under the provisions of General Statutes, c. 113, sec. 2. Said suit is No. 386 upon the equity docket of this court, and is still pending, no hearing upon the merits having ever been had.

In said suit a subpœna was duly issued November 28, 1881, returnable on the first Monday of January, 1882. Said subpœna was duly served on the defendants Elbridge L. Sweetser and Solon O. Richardson, trustee, on November 29, 1881. The attorney for said Florence Machine Company in the bringing of said suit was Warren O. Kyle, Esq. On or about February 1, 1882, said Elbridge L. Sweetser filed an answer to said bill, in which, among other things, he denied that he had any such interest under the will of Solon O. Richardson as could be reached and applied to the payment of the claim of the Florence Machine Company, and also denied the validity of the claim of the Florence Machine Company upon said notes, but did not deny the making of said notes.

On or about February 1, 1882, the said Solon O. Richardson, trustee under said will, also filed an answer to said bill, setting forth, among other things, that the said Elbridge L. Sweetser, on February

23, 1878, was adjudged a bankrupt in the United States district court, and that assignees were duly appointed, and suggesting that if any interest in said trust fund, legal or equitable, ever did vest in said Sweetser, such interest passed to the said assignees in bankruptcy.

On August 29, 1882, the said Horace P. Dibble filed, in the United States district court, his resignation as assignee of the estate of said Elbridge L. Sweetser, but the same was not accepted until December 16, 1882, when Warren O. Kyle, Esq., aforesaid, was appointed in his place as co-assignee with the said William B. H. Dowse. The said Dowse and Kyle have continued in office as said assignees to the present time.

On September 19, 1882, a bill in equity prepared by the said Dowse and signed by him on behalf of himself and said Horace P. Dibble, assignees of the estate of said Elbridge L. Sweetser, and sworn to by said Dowse, September 19, 1882, was filed in the said United States district court against said Elbridge L. Sweetser and said Solon O. Richardson, said trustee under the will of his father. In and by said bill in equity said assignees Dowse and Dibble alleged that the said Sweetser had an interest as legatee under the will of said Solon O. Richardson, deceased, which he, the said Sweetser, did not set forth in his bankruptcy schedule of property; that said interest had accrued and vested in said Sweetser before the date of his petition in bankruptcy, and that said interests passed to them as such assignees, and that they had no knowledge, until within a few days prior to the filing of the bill, of the said interest of the said Sweetser, as legatee under said will; and further alleging that they, as such assignees, were entitled to have the interest of said Sweetser in said trust property assigned and conveyed to them and
73 their title thereto confirmed and established. Said assignees Dowse and Dibble, until shortly prior to the filing of said bill, had no actual knowledge of the said interest of the said Sweetser as legatee under said will.

In the prayer of said bill said assignees prayed, among other things, that the said Elbridge L. Sweetser might be directed to execute and deliver such instruments as would convey to said assignees all his interest as legatee under the said will, and that the said trustee, Solon O. Richardson, might be enjoined from paying to the said Elbridge L. Sweetser, or any person or persons claiming under him, any part of the said trust fund, or the income thereof, which might accrue and become payable to the said Elbridge L. Sweetser. There were no other parties to said suit.

On December 2, 1882, the defendant Elbridge L. Sweetser filed a general demurrer to said bill, and upon the same date the said Solon O. Richardson, trustee, also filed a general demurrer to said bill. No hearing has ever been had in said case, either upon the demurrers or upon the merits, and said case is still pending in said court.

On November 15, 1882, said Florence Machinery Company, by its attorney, said Warren O. Kyle, filed a general replication in

said suit brought November 28, 1881, in this court, being No. 386 equity.

On October 24, 1885, the said Elbridge L. Sweetser executed and delivered to the Monitor Oil Stove Company and to Solon O. Richardson, aforesaid, individually, respectively, two witnessed notes: one, for the sum of $1809, dated October 24, 1885, payable in six months, with interest, to the order of the Monitor Oil Stove Company, and the other for the sum of $506.05, dated October 24, 1885, payable in six months, with interest, to the order of said Solon O. Richardson; and on the same date, as security for the payment of said notes, respectively, without priority one over the other, gave a written mortgage or assignment under seal, conveying all his equitable interest under the will of said Solon O. Richardson, deceased, to the said Monitor Oil Stove Company and the said Solon O. Richardson. Hannah Sweetser, the wife of said Elbridge L. Sweetser, signed said notes as joint maker, and joined in said mortgage assignment, and notice of such mortgage assignment was acknowledged on October 24, 1885, by William Morton, the then trustee under the will of the said Solon O. Richardson, deceased. A copy of said mortgage assignment is hereto annexed and marked "Exhibit No. 3."

On the same date, to wit, October 24, 1885, the said Elbridge L. Sweetser, and his said wife Hannah Sweetser, joining with him, executed and delivered to one Sidney P. Brown a written assignment under seal, conveying to the said Sidney P. Brown all their interest under said will of Solon O. Richardson aforesaid, subject to the mortgage assignment above referred to. Notice of this assignment was acknowledged in writing by said William Morton, trustee, on October 24, 1885. A copy of said assignment is hereto annexed and marked "Exhibit No. 4." On the same
74 date, to wit, October 24, 1885, the said Sidney P. Brown, by a like assignment in writing, conveyed to Hannah Sweetser all his said interest. Notice of said assignment was acknowledged by the said trustee, Wiliam Morton, on the same day. A copy of said assignment is hereto annexed and marked "Exhibit No. 5."

On October 24, 1885, the said Florence Machine Company brought an action at law in the Superior Court, Suffolk county, against said Elbridge L. Sweetser, in which said assignees in bankruptcy, Dowse and Kyle, were summoned as trustees. The declaration as drawn was upon eight promissory notes given by said Elbridge L. Sweetser prior to February 23, 1878, which had been proved in his bankruptcy proceedings, aggregating $7620.13, and upon an account annexed, based upon ledger entries made by the Florence Machine Company in the year 1881. A copy of said account annexed is hereto annexed and marked "Exhibit No. 6." Said Dowse and Kyle, assignees in bankruptcy, summoned as trustees, were duly served with process, but did not appear, and were defaulted.

On October 26, 1885, in said equity suit No. 386, said Solon O. Richardson, trustee, filed a further answer, setting forth that since the bringing of the bill he had resigned his office as trustee under

said will, and that William Morton had been appointed sole trustee and had accepted the trust.

On March 10, 1886, said Elbridge L. Sweetser and Hannah Sweetser made and delivered to George D. Atkins their witnessed promissory note, payable, on demand, to the order of said Atkins for the sum of $400, with interest at 6 per cent., and as security for the same executed and delivered to said Atkins a mortgage assignment under seal, assigning to said Atkins all their interest under the will of Solon O. Richardson, subject, however, to the prior mortgage to the Monitor Oil Stove Company and Solon O. Richardson the younger. Said note, and mortgage securing the same, is still held by the said Atkins, no payment having been made thereon. On June 16, 1891, on motion of said W. B. H. Dowse, said Warren O. Kyle was joined with him as a party plaintiff in said suit of Dibble *et al. v.* Sweetser *et al.* in United States district court, and Daniel G. Walton, the then trustee under the said will of Solon O. Richardson, deceased, was summoned to appear as a party defendant.

On July 21, 1891, said Monitor Oil Stove Company, by written assignment under seal, assigned to the Central Oilgas Stove Company all its property of every description. On July 30, 1891, said Walton accepted service and appeared by counsel in said case.

On November 4, 1891, said Walton, as trustee under said will, filed a general demurrer to the bill in said suit of Dibble *et al. v.* Sweetser *et al.* On April 19, 1893, the Florence Machine Company was dissolved by an act of the legislature, c. 215, of the acts of 1893, which may be referred to.

75 On August 13, 1894, the said Florence Machine Company filed a motion in said equity suit No. 386, praying that Daniel G. Walton, the successor of William Morton, trustee, and the said William B. H. Dowse and Warren O. Kyle, assignees in bankruptcy, might be made parties defendant and summoned to answer the plaintiff's bill. Thereupon a subpœna was issued, dated August 14, 1894, directed to the said Walton, trustee, and to the said Dowse and Kyle, assignees in bankruptcy. Service of said subpœna was made on said Walton on August 18, 1894, and service was accepted by said Dowse and Kyle, assignees in bankruptcy, on August 30, 1894. Afterwards, on September 11, 1894, Charles H. Tyler, Esq., entered his appearance for the said Daniel G. Walton, trustee under said will. On or about October 1, 1894, said Florence Machine Company assigned to the said Central Oilgas Stove Company all its choses in action of every description.

On January 18, 1895, said action at law in the Superior Court, brought by the Florence Machine Company against Elbridge L. Sweetser, having been referred to an auditor, said auditor filed his report, a copy of which is hereto annexed and marked "Exhibit No. 7."

On or about October 29, 1895, the said Central Oilgas Stove Company made a common-law assignment of all its property to M. F. Dickinson, Jr., Calvin H. Hill, and Charles W. Conant, for the benefit of its creditors, which assignment was duly assented to by creditors.

On February 19, 1896, judgment was entered in said action at law in the Superior Court brought by the Florence Machine Company against Elbridge L. Sweetser, said judgment being in favor of the plaintiff for the amount found due by the auditor, namely, for the sum of $11,966.91, and interest from the date of the writ to November 4, 1895, the judgment being entered as of November 4, 1895. At the time said judgment was entered no order had been made, either charging or discharging the defendants Dowse and Kyle, assignees in bankruptcy, summoned as trustees. Execution issued upon said judgment on February 21, 1896, against said Elbridge L. Sweetser, and also against Messrs. Dowse and Kyle as assignees in bankruptcy. Said execution was never placed in the hands of an officer, and no demand was made upon the alleged trustees, Messrs. Dowse and Kyle, assignees in bankruptcy, and nothing has ever been collected upon said judgment or execution. Said John C. Hammond now owns said judgment.

On or about November 3, 1896, said common-law assignees, Dickinson, Hill, and Conant, by a written instrument under seal, assigned to John C. Hammond, one of the respondents in this case, all the choses in action and all the other personal property remaining in their hands as such common-law assignees, they having previously made no sale or assignment of any claims of any sort against said Elbridge L. Sweetser.

On March 1, 1897, said Solon O. Richardson the younger, having brought suit in the Superior Court for Middlesex county
76 against Elbridge L. Sweetser and his wife, Hannah Sweetser, upon said note for $506.05, and upon another note for $125, obtained judgment for damages and costs in the sum of $902.37; and on May 25, 1897, took out execution thereunder. Said Solon O. Richardson still holds said execution wholly unsatisfied.

On May 15, 1899, said John C. Hammond entered his appearance for the plaintiff in said suit in equity brought by the Florence Machine Company, No. 386 equity, and also entered his appearance *pro se*, and filed a motion setting forth the said assignments to him of the claim in suit, and asking to be permitted to prosecute the said suit in his own name.

On May 20, 1899, the said Dowse and Kyle, assignees in bankruptcy, filed an answer in said suit in equity, No. 386, setting forth the bankruptcy of said Elbridge L. Sweetser and the appointment of assignees in bankruptcy, and the resignation of Horace P. Dibble as assignee, and the appointment of said Kyle as assignee in his place, and further alleging, upon information and belief, that the said defendant Sweetser had, at the time of the assignment in bankruptcy, a vested interest in the trust fund under the said will, and that by the operation of the United States bankrupt act, said interest had been transferred to them.

On November 26, 1900, said Elbridge L. Sweetser, having filed a second voluntary petition in bankruptcy in the United States district court for the district of Massachusetts, was on that date adjudged a bankrupt, and on December 27, 1900, Marquis F. Dickinson, Jr.,

was appointed trustee in bankruptcy of his estate. Said Dickinson has received no assets of any value and has paid no dividend.

The claims proved in said second bankruptcy were as follows:—

| | |
|---|---|
| N. A. Dill | $7 75 |
| Martha A. Whittredge | 886 43 |
| Richard Dowd | 16 90 |
| John C. Hammond | 26,075 39 |

The claim proved by said Hammond was for the judgment obtained by the Florence Machine Company in 1896 as aforesaid.

Said Hammond, by leave of court, subsequently withdrew said proof of claim and made a provisional proof for the balance, after deducting $18,000 as the estimated value of the security obtained by said equitable attachment made by Florence Machine Company in 1881.

On December 15, 1900, said Mary A. Sweetser, the mother of Elbridge L. Sweetser, being the last survivor of the three sisters, beneficiaries under said will of Solon O. Richardson, died,
77 leaving, as her only child, the said Elbridge L. Sweetser. At the time of her decease, the only other child of any of said three sisters was said Martha A. Whittredge, the wife of William W. Whittredge.

On February 1, 1901, the said William W. Whittredge, being then the sole succeeding trustee under said will of Solon O. Richardson, filed his bill for instructions in this court, being the suit in which this agreement is made.

On April 22, 1901, in said case of Dibble *et al. v.* Sweetser *et al.*, in United States district court, said William W. Whittredge, trustee under said will, was summoned to appear as a party defendant.

He accepted service May 24, 1901, and appeared by counsel June 12, 1901.

On July 1, 1901, said John C. Hammond filed a petition in said case of Dibble *et al. v.* Sweetser *et al.*, asking to be joined as a party defendant and for leave to appear and answer. In this petition the said Hammond, among other things, alleged that the said Dowse and Kyle, as assignees in bankruptcy of Elbridge L. Sweetser, were not entitled to the equitable interest of the said Sweetser under said will as against the said Hammond, as assignee of the Florence Machine Company; among other reasons, because such rights as said Dowse and Kyle, as assignees, formerly had, if any, were barred by the statute of limitations, United States Rev. Sts. sec. 5057.

On July 5, 1901, said William W. Whittredge, trustee, filed an answer in said case of Dibble *et al. v.* Sweetser *et al.*, among other things alleging that on November 28, 1881, the Florence Machine Company had brought a bill in equity by the said Warren O. Kyle, its then attorney, in the Supreme Judicial Court for the commonwealth of Massachusetts, seeking to reach said Sweetser's interest in said fund, and that said action was still pending, and that the preceding trustee had been made a party defendant therein; also alleging that the said Whittredge, as trustee, had brought a bill for

instructions in said state court, and had joined among the parties defendant the said Dowse and Kyle, assignees of Sweetser; also alleging that the right of action of said Dowse and Kyle as assignees was barred by the limitations of law.

On October 6, 1901, William P. Harding, having, on March 5, 1888, obtained a judgment against Elbridge L. Sweetser and Hannah Sweetser for $299.16, and being the holder of a note for $200, made by Hannah Sweetser, brought a bill in equity in this court, against Hannah Sweetser and William W. Whittredge, trustee under said will of Solon O. Richardson and said Dowse and Kyle, assignees in bankruptcy, seeking to reach and apply the interest of said Elbridge L. Sweetser under the will of Solon O. Richardson (conveyed as aforesaid to Hannah Sweetser) in satisfaction of his said judgment and note. Said suit is still pending.

78 The suit in equity in the United States district court brought by the assignees of Sweetser in the first bankruptcy has been continued from time to time at the request of said assignees, who have appeared for that purpose at the callings of the docket in said court to await the termination of the life interests in said fund.

As already stated, no hearing has been had either upon the said demurrers or upon the merits.

In September, 1901, after the present suit in which this agreement is made had been set down for hearing by said assignees in bankruptcy, they were enjoined by said United States district court from further proceeding therein at that time, which injunction was by consent dissolved by said court on November 21, 1904, and on November 29, 1904, on motion of said assignees, assented to by all parties, this suit was assigned for hearing on December 9, 1904.

On February 10, 1904 (the said assignees Dowse and Kyle having disputed the right of said John C. Hammond to be subrogated to the rights of the Florence Machine Company as to the claims proved by said company against the estate in bankruptcy of said Sweetser in 1878, and having petitioned to have said claims expunged), the United States district court made a decree in favor of said Hammond. A copy of said decree is annexed hereto and marked "Exhibit 8."

Said decree has since been affirmed by the United States Circuit Court of Appeals. For report of case see Dowse *et al. v.* Hammond, 130 Fed. Rep. 103.

Said John C. Hammond is now the owner and holder of the five notes aforesaid made by Elbridge L. Sweetser, which were held by the Florence Machine Company when it brought said suit in equity, No. 386, and there is now due said Hammond upon said notes, with interest made up to December 1, 1904, the sum of $14,557.60.

Said Hammond is also the present owner and holder of the note for $1809 secured by mortgage assignment given by Elbridge L. and Hannah Sweetser to the Monitor Oil Stove Company, October 24, 1885, and there is now due said Hammond upon said note, with interest to December 1, 1904, the sum of $3882.11.

Said Solon O. Richardson the younger is the present owner of the claim represented by the note for $506.05 secured by mortgage assignment given by Elbridge L. and Hannah Sweetser, October 24, 1885, and there is now due him upon said claim, with interest to December 1, 1904, the sum of $1085.98.

The amount due said William P. Harding from Hannah Sweetser upon his said note and judgment, with interest to December 1, 1904, is $500.

The amount due the said George D. Atkins upon said note given by Elbridge L. and Hannah Sweetser, March 10, 1886, with interest to December 1, 1904, is $849.20.

That part part of the trust fund now held by said William W. Whittredge as trustee, which is the subject matter of this suit, consists of property worth about $18,000.

79 On December 17, 1904, the said John C. Hammond filed a motion in said equity case No. 386, asking leave to file a special replication to the answer of said Dowse and Kyle, assignees, setting up the statute of limitations, United States Rev. Sts. sec. 5057, as a bar to the claim made by said assignees in their answer.

M. E. S. CLEMONS,
*Attorney for William W. Whittredge, Trustee.*
HOLLIS R. BAILEY,
*Attorney for John C. Hammond.*
FRED JOY,
*Attorney for W. B. H. Dowse and W. O. Kyle, Assignees.*
DICKINSON, FARR & DICKINSON,
*Attorneys for M. F. Dickinson, Trustee.*
WILLIS W. STOVER,
*Attorney for E. L. Sweetser.*
GEORGE A. BROWN,
*Attorney for Hannah Sweetser.*
WILLIAM P. HARDING, *Pro se.*
CHESTER A. REED,
*Attorney for George D. Atkins.*
C. H. TYLER,
*Attorney for Solon O. Richardson.*

Filed December 21, 1904.

EXHIBIT No. 1.

Know all Men by These Presents, That I, Solon Osmond Richardson of Wakefield, in the County of Middlesex, Commonwealth of Massachusetts, Physician, being of sound mind and memory, do hereby make and publish this my last Will and Testament,—hereby revoking and making void all former Wills by me at any time heretofore made.

Item One. I direct that my body be interred at Mt. Auburn Cemetery, within the lot therein now belonging to me.

Item Two. I direct that all my debts and funeral expenses be paid as soon after my decease as possible, from the first money that shall come into the hands of my Executors from any part of my estate.

Item Three. In the disposal of my estate and property, real and personal, I give, devise, and bequeath as follows: That is to say,—

80 Item Four. To my dear and beloved wife, Susan Richardson, I hereby give and bequeath the dwelling-house and out buildings which I now occupy in Wakefield, including the building (and the land on which it stands) formerly occupied as a dwelling-house, and which I now improve as a bowling room, together with all the land belonging to me connected with said estates, and which extends westerly to the road on which the Boston and Maine Railroad Depot is located. The Wiley estate, so called, adjoining my dwelling-house on the north, in consequence of its close proximity should not be separated from my homestead estate; therefore the said Wiley estate I include with my homestead estate, and hereby give and bequeath the same to my wife Susan, together with all the land and privileges belonging to each of said estates, the said Susan, my wife, to have and to hold the afore-named estate for her benefit and use so long as she shall remain my widow, but in no case shall she be allowed to sell or dispose of, otherwise than to rent or occupy, either or any portion of said estate; at the decease of my wife, or in event of her marriage, I direct and my will is that the estates above described shall revert to my son, Solon Osmond Richardson, Jr., to be his property forever.

Item Five. The manufacture of medicine which I have so long and prosperously conducted, I wish to have continued without interruption, believing that my son, Solon Osmond, could, with the assistance of Mr. Ebenezer Wiley, conduct the same without detriment to his present business, do hereby give, devise and bequeath to my said son Solon Osmond Richardson, Jr., the building and land belonging to the same which I now occupy for the manufacture of medicine,—the said building is situate in said Wakefield, on the corner of Mechanic and Crescent Streets; also I give and bequeath to him my stock of medicine, machinery, furniture, and casks found in said Laboratory, also the bottles, boxes, plates for printing, and all articles belonging to me, wherever they may be stored, connected with the manufacture of medicine, including also the stock of medicine on hand which is prepared and ready for sale, and also the book accounts due me for medicine. It is my wish, and I enjoin it upon my son, but not as a condition of my will, that he will retain in his employ, upon as favorable terms to the employee as he now receives from me, Ebenezer Wiley. He has been in my employ a great number of years; he is intelligent, honest, and his fidelity can be relied upon; also he fully understands the manufacture, and my method of preparing medicine, but he does not possess the formula or receipt from which my medicines are compounded. I trust that my son will retain him in his employ during the life of said Wiley. The foregoing described property I give to my son Solon Osmond to be his property forever.

Item Six: I hereby give and bequeath to my beloved wife Susan, all my household furniture, horses, carriages, harnesses, stable furniture and equipments, hay and grain belonging to me, to be the property of my wife forever.

81 Item Seven. I hereby give and bequeath to my Executors, in trust, the sum of eighty thousand dollars, which amount I direct to be invested in the safest securities from which punctual and permanent dividends may be derived, the income from said investment I direct to be divided equally and paid each and each alike to my wife Susan and my son Solon Osmond. In case of the decease of my son, the share belonging to him to revert to his widow and children, including any children which may hereafter be born to him, to be shared by them each and each alike, intending that one-half of the income from said fund shall be paid to my wife in semi-annual payments, the other half to be paid to my son or to his widow and children as above stated during the life of my wife; at the decease of my wife, the income from the whole of said fund to be disposed of as hereinafter directed.

Item Eight. I hereby give and bequeath to my Executors, in trust, the sum of thirty-five thousand dollars, to be invested as before herein advised, the income from which I direct to be divided and shared equally between my three following named sisters, viz: Mary A. Sweetser, Martha Hutchinson, and Louisa Richardson, and paid to them each and each alike semi-annually, to them alone, and upon their personal receipt only, and that they shall hold the same to their sole and separate use, free from the interference or control of their husbands; and it is my will that they shall not be allowed by any sale or assignment to dispose of their respective incomes as aforesaid, or anticipate the same, as it is my intention that my said sisters shall receive the income herein provided for them, and that they shall not be able to deprive themselves of it through the influence of their husbands or friends; and I therefore direct, and it is my will, that in case they, or any of my said sisters, shall make any attempt to assign the whole or any part of the income herein provided and bequeathed to them, that the assignment shall be void, and the part of the income so attempted to be assigned shall be forfeited so far as the one making it is concerned, and become a part of the trust fund provided herein for my wife and son, and paid to them by my Executors as directed in relation to said trust fund; the income as above stated, and with conditions aforenamed, to be paid to my said sisters respectively during their natural lives. At the decease of my said sisters, or either of them, my will is that the share belonging to the deceased sister shall revert to her children, to be shared by them each and each alike; if either of my said sisters shall die childless, the income belonging to her I direct shall revert to the said sisters surviving, to be shared equally between them. At the decease of all my three said sisters, I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my Executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever.

Item Nine: I give and bequeath to my Executors, in trust,
82 the sum of twelve thousand dollars, the income from which I direct to be paid equally, in semi-annual payments, to my half-sister Elizabeth Richardson and my half-brother Warren Richardson, during their natural lives; at the decease of either of the aforenamed, the share of the deceased to revert to his or her children; at the decease of both the said Warren and Elizabeth, I direct that the fund from which the income herein provided for them has been derived, shall be divided into equal parts and paid each and each alike to the children, or the guardians of the children of my said half-brother and -sister, the same to be their property forever.

Item Ten. My half-brother Alden B. Richardson, now a resident in the State of Delaware, has been highly successful in his business, and I feel assured that his manly and sagacious elements of character are sufficient to ensure his prosperity through life, therefore, to him, the said Alden, in token of my affection, I give and bequeath the sum of five hundred dollars, the same to be his property forever.

Item Eleven. To Ebenezer Wiley, husband of my wife's sister, a faithful and esteemed man, who has been in my employ for many years, I give and bequeath to him the sum of three thousand dollars, to be his property forever.

Item Twelve. At the decease of my son Solon Osmond, in case he shall leave no children, my will is, and I direct that the income from my property belonging to him shall be divided and paid each and each alike to my son's widow and to my wife, to be paid to them in semi-annual payments during the life of my wife.

Item Thirteen. The income from my property as hereinbefore stated, and all other income from property belonging to me not herein otherwise appropriated, I direct to be paid to my wife and son in equal proportions during their natural lives. At the decease of my wife I direct that the income from the fund herein appropriated to her shall revert to my son Solon Osmond; after the decease of both my wife and son, my will is, and I direct that one half of the income which my son would be entitled to from my property if he were living, shall be paid to his widow during her natural life; the other half of my son's income I direct shall be divided and shared each and each alike between the children of my son, including any and all which may hereafter be born belonging to him, and be paid to said children, or their guardians, in semi-annual payments, during the life of their mother. In case of the decease of one of said children during its minority, the share of the deceased child to revert to the surviving children; at the decease of my son's widow, my will is, and I hereby direct, that all my property from which my son's widow and her children have derived an income, and all other property which has not herein been appropriated, belonging to my estate, shall all be divided and shared, each and each alike, between the children of my son Solon Osmond, including any which may hereafter be born to him, and I hereby direct my Executors to pay to them their respective shares as they shall arrive at the age of twenty-one years, the same to be
83 the property of my said grandchildren forever.

Item Fourteen. In case no grandchild of mine shall live

to arrive at the age of twenty-one years, my will is, and I direct my Executors to pay to the town of Wakefield the sum of ten thousand dollars, which I direct shall be safely invested by the Selectmen of said town, the income from which fund I direct shall be appropriated as follows, that is to say: One half of the amount of income from said fund to be paid to the School Committee of the said town of Wakefield, for the procurement of school apparatus, or otherwise expended as the said Board of School Committee shall deem best to promote the advancement of said schools; the remaining half of said income I direct shall be appropriated and paid for prizes to be contended for by the scholars of the several public schools in said town of Wakefield; the said prizes, with a proper observance of difference in grade of said schools, to be apportioned and divided respectively among said public schools; and I direct that the Board of School Committee of said town shall decide all questions pertaining to the selection and allotment of the prizes, and also adjudge said prizes to each of the six best and most deserving scholars in each and every public school in said town of Wakefield, the examination and award of said prizes to be made annually forever. The income for the procurement of school apparatus is intend*ing* for and to promote the advancement of the public schools of Wakefield only.

Item Fifteen. The balance of my property after the foregoing bequests have been complied with, I direct shall revert to my heirs at law, the same to be the property of my heirs forever.

Item Sixteen. The share of my estate herein bequeathed to my wife to be in lieu of her right of Dower in my estate at common law.

Item Seventeen. I hereby make, constitute and appoint my dear and beloved wife Susan Richardson, and my esteemed friend William Morton, of Newton, in the County of Middlesex, Commonwealth of Massachusetts, Executors and Trustees of this my last will and testament; and as I have full and implicit confidence in the persons herein named as my Executors, my will is, and I request or direct, that no bond other than their several personal obligations shall be required of them from the Probate Office.

In Witness Whereof, I, the said Solon Osmond Richardson, have signed and sealed, and have published and declared this instrument as my Will, at Boston, this ninth day of September, A. D., eighteen hundred and sixty-nine.

SOLON OSMOND RICHARDSON.

(Three Witnesses signed this Will.)

84 EXHIBIT 2.

*Copy of Notes Sued on in Suit in Equity No.* 386.

$2967.67. BOSTON, *June* 13, 1881.

Four Months after date I promise to pay to the order of The Florence Machine Co. Twenty-nine Hundred and Sixty-seven 67/100 Dollars at First National Bank of Northampton Mass.

Value Received.

ELBRIDGE L. SWEETSER.

$712.86/100. BOSTON, *June* 25, 1881.

Four Months after date I promise to pay to the order of Florence Machine Co. Seven Hundred Twelve 86/100 Dollars at Northampton Nat. Bank Northampton.
Value Received.
Due Oct 25/28.

ELBRIDGE L. SWEETSER.

$900. BOSTON, *July* 5, 1881.

Four months after date I promise to pay to the order of Florence Machine Co. Nine Hundred Dollars at Northampton Nat. Bank Northampton.
Value Received.

ELBRIDGE L. SWEETSER.

$810.20. BOSTON, *July* 23, 1881.

Four months after date I promise to pay to the order of Florence Machine Co. Eight Hundred & Ten 20/100 at Northampton Nat. Bank Northampton Mass.
Value Received.

ELBRIDGE L. SWEETSER.

$721.37/100. BOSTON, *Aug 3rd*, 1881.

Three months after date I promise to pay to the order of Florence Machine Co. Seven Hundred Twenty-one 37/100 Dollars at Northampton Nat. Bank Northampton Mass.
Value Received.

ELBRIDGE L. SWEETSER.

EXHIBIT No. 3.

Know all men by these presents, that whereas by the terms of the will of Solon Osmond Richardson late of Wakefield in the County of Middlesex and Commonwealth of Massachusetts, and the
85 eighth item in said will, the sum of thirty-five thousand dollars was bequeathed to the Executors named in said will, in trust for the purposes following, to wit:—1st. To be invested and the income thereof to be divided equally between the three sisters of said testator, viz:—Mary A. Sweetser, the mother of the said Elbridge L. Sweetser hereinafter mentioned, and Martha Hutchinson and Louisa Richardson, aunts of said Elbridge L. Sweetser, and after the decease of said three sisters the principal of said trust, to wit:—said $35,000 to be divided equally between the children of said three sisters: and

Whereas said Elbridge L. Sweetser is the only child of the said Mary A. Sweetser;

Now Therefore, I, Elbridge L. Sweetser of Everett in the County of Middlesex and Commonwealth aforesaid, in consideration of the sum of eighteen hundred and nine dollars to me paid by the Monitor Oil Stove Company of Cleveland in the State of Ohio, and the sum of

five hundred and six and 5-100 dollars to me paid by Solon O. Richardson of Wakefield in said county of Middlesex, the receipt of both of which said sums is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Monitor Oil Stove Company and said Solon O. Richardson, neither to have priority over the other, all my right, title and interest in and to the following goods and chattels, securities and right in property and the proceeds thereof, to wit, a certain promissory note for the sum of twelve thousand dollars signed by J. F. C. Hyde secured by mortgage of real estate in Newton in said County of Middlesex, also notes for eleven thousand dollars signed by Sarah H. and E. M. Fowler secured by mortgage of real estate in said Newton, also note for eight thousand dollars signed by Waldo E. Perkins secured by mortgage of real estate in said Reading, also note for five thousand dollars signed by Edward Fewkes secured by mortgage of real estate in said Newton, also note for four thousand dollars signed by Sarah L. and Joseph Walker secured by mortgage of real estate in said Newton, also a note for two thousand dollars signed by Warren and Alden B. Richardson and a note for fifteen hundred dollars signed by Elizabeth and Willard Marcy secured by mortgage of real estate in said Newton, all of the above notes and securities having been given to and are not (now) held by William Morton of said Newton, now the sole Executor and Trustee under said will, meaning and intending hereby to convey to said Monitor Oil Stove Company and said Solon O. Richardson all the right, title and interest in and to any and all trust property under said will — which I now or shall be at any time entitled.

To Have and to Hold all and singular the said goods and chattels, property and rights of property to the said Monitor Oil Stove Company, its successors and assigns and to the said Solon O. Richardson, his executors, administrators and assigns, to their own use and behoof as aforesaid, forever.

And I hereby Covenant with the grantees that I am the lawful owner of said property and rights in property and that it is free from all incumbrances made or suffered by me, that I have
86 good right to sell the same as aforesaid and that I will warrant and defend the same against the lawful claims and demands of all persons.

Provided Nevertheless, that if I or my executors, administrators or assigns shall pay unto the grantees or their executors, administrators, successors or assigns, the sum of eighteen hundred and nine dollars and five hundred and six and 5-100 dollars respectively without priority one over the other, in six months from the date hereof, with interest as stated in two notes of even date herewith signed by me, and shall not waste or destroy the property aforesaid nor suffer any part thereof to be attached on mesne process, and shall not, except with the consent in writing of both of the grantees or their representatives, attempt to sell or convey the same or any part thereof, then this deed as also the notes aforesaid shall be void.

But upon default in the performance of the foregoing condition,

the grantees or either of them, or their representatives may sell said property at private sale or public auction, first giving ten days' notice in writing of the time and place of sale to me or my representatives.

And out of the money arising from such sale the grantees or their representatives shall be entitled to retain all sums secured by this mortgage whether then or there after payable, including all costs, charges and expenses incurred or sustained by them in relation to the said property and rights of property, or to discharge any claim or liens of third persons affecting the same, rendering the surplus, if any, to me or my representatives.

And it is agreed that the grantees or their representatives or any person in their behalf may purchase at any sale made as aforesaid and that after default as aforesaid the grantees or either of them or those claiming under them may take immediate possession of said property and rights in property at the termination of the trust mentioned in said will, and for that purpose may so far as I can give authority therefor enter into and upon any premises on which said property or any part thereof may be situated and may remove the same therefrom.

In Witness Whereof I, the said Elbridge L. Sweetser, and Hannah Sweetser wife of said Elbridge L. Sweetser, in consideration of the aforesaid hereby releases all her right, title and interest in and to the above mentioned property, have hereunto set our hands and seals this twenty-fourth day of October in the year of our Lord one thousand eight hundred and eighty-five.

ELBRIDGE L. SWEETSER. [SEAL.]
HANNAH SWEETSER. [SEAL.]

Signed, sealed and delivered in presence of

—— ——.

SUFFOLK, *ss:*

BOSTON, *Oct.* 24, '85.

I hereby acknowledge notice of this deed.

WM. MORTON, *Trustee.*

87 EXHIBIT No. 4.

Know all Men by These Presents that whereas by the terms of the will of Solon Osmond Richardson late of Wakefield in the County of Middlesex and Commonwealth of Massachusetts, and the eighth item of said will, the sum of thirty-five thousand dollars was bequeathed to the executors named in said will, in trust for the purposes following, to wit,—1st. to be invested and the income thereof to be divided equally between the three sisters of said testator, viz:—Mary A. Sweetser, the mother of the said Elbridge L. Sweetser hereinafter mentioned, and Martha Hutchinson and Louisa Richardson, aunts of said Elbridge L. Sweetser, and after the decease of said three sisters the principal of said trust, to wit:—said

thirty five thousand dollars, to be divided equally between the children of said three sisters; and

Whereas the said Elbridge L. Sweetser is the only child of the said sister, Mary A. Sweetser;

Now Therefore I, Elbridge L. Sweetser of Everett in the County of Middlesex and Commonwealth aforesaid in consideration of one dollar and other value consideration paid by Sidney P. Brown, of Waltham in the County of Middlesex and Commonwealth of Massachusetts, unmarried, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Sidney P. Brown, all my right title and interest in and to the following goods, chattel, securities and rights in property and the proceeds thereof, to wit,—a certain promissory note for the sum of twelve thousand dollars signed by J. F. C. Hyde secured by a mortgage of real estate in Newton in said County of Middlesex, also notes for eleven thousand dollars signed by Sarah H. and E. M. Fowler secured by mortgage of real estate in said Newton, also note for eight thousand dollars signed by Waldo E. Perkins secured by mortgage of real estate in Reading in said County of Middlesex, also note for five thousand dollars signed by Edward Fewkes secured by mortgage of real estate in said Newton, also note for four thousand dollars signed by Sarah L. and Joseph Walker secured by mortgage of real estate in said Newton, also a note for two thousand dollars signed by Warren and Alden B. Richardson and a note for fifteen hundred dollars signed by Elizabeth and Willard Marcy secured by mortgage of real estate in said Newton, all of the above notes and securities having been given to and are now held by William Morton of said Newton, now the sole executor and trustee under said will, meaning and intending hereby to convey to said Sidney P. Brown, all the right, title and interest in and to any and all trust property under said will which I now am or shall be at any time entitled.

To Have and to Hold all and singular the said goods and chattels, property and rights of property to the said Sidney P. Brown, his executors, administrators and assigns to their own use and behoof as aforesaid, forever.

88 And I hereby covenant with the grantee that I am the lawful owner of said property and rights of property and that it is free from all incumbrances except a mortgage to the Monitor Oil Stove Company and Solon O. Richardson and life estates as provided in the will of Solon Osmond Richardson.

In Witness Whereof I, the said Elbridge L. Sweetser and I Hannah Sweetser, wife of said Elbridge L. Sweetser, in consideration of the aforesaid hereby releases all her right, title and interest in and to the above mentioned property, have hereunto set our hands and seals this twenty-fourth day of October in the year of our Lord one thousand eight hundred and eighty-five.

ELBRIDGE L. SWEETSER. [SEAL.]
HANNAH SWEETSER. [SEAL.]

Signed, sealed and delivered in presence of

—— ——.

SUFFOLK, *ss:*

BOSTON, *Oct.* 24, '85.

I hereby acknowledge notice of this deed.

WM. MORTON, *Trustee.*

EXHIBIT No. 5.

Know All Men by These Presents That Whereas by the terms of the will of Solon Osmond Richardson late of Wakefield in the County of Middlesex and Commonwealth of Massachusetts, and the eighth item in said will, the sum of thirty-five thousand dollars was bequeathed to the executors named in said will, in trust for the purposes following, to wit:—1st. to be invested and the income thereof to be divided equally between the three sisters of said testator, viz:—Mary A. Sweetser, the mother of the said Elbridge L. Sweetser hereinafter mentioned and Martha Hutchinson and Louisa Richardson, aunts of said Elbridge L. Sweetser, and after the decease of said three sisters the principal of said trust, to wit;—said thirty-five thousand dollars, to be divided equally between the children of said three sisters; and

Whereas the said Elbridge L. Sweetser is the only child of the said sister Mary A. Sweetser;

Now Therefore, I, Sidney F. Brown, of Waltham in the County of Middlesex and Commonwealth aforesaid, in consideration of one dollar and other valuable consideration paid by Hannah Sweetser, of Everett, in said County of Middlesex, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever Quitclaim unto the said Hannah Sweetser, all my right,
89 title and interest in and to the following goods, chattels securities and rights in property and the proceeds thereof, to wit;—a certain promissory note for the sum of twelve thousand dollars signed by J. F. C. Hyde secured by mortgage of real estate in Newton in said County of Middlesex, also notes for eleven thousand dollars signed by Sarah H. and E. M. Fowler secured by mortgage of real estate in said Newton, also note for eight thousand dollars signed by Waldo E. Perkins secured by mortgage of real estate in Reading in said County of Middlesex, also note for five thousand dollars signed by Edward Fewkes secured by Mortgage of real estate in said Newton, also note for four thousand dollars signed by Sarah L. and Joseph Walker secured by mortgage of real estate in said Newton, also a note for two thousand dollars signed by Warren and Alden B. Richardson and a note for fifteen hundred dollars signed by Elizabeth and Willard Marcy secured by mortgage of real estate in said Newton, all the above notes and securities having been given to and are now held by William Morton of said Newton, now the sole executor and trustee under said will, meaning and intending hereby to convey to said Hannah Sweetser, all the right, title and interest in and to any and all trust property under said will conveyed to me by Elbridge L. Sweetser by deed of even date hereof.

To Have and to Hold all and singular the said goods and chattels, property and rights of property to the said Hannah Sweetser her executors, administrators and assigns to their own use and behoof as aforesaid, forever.

And I hereby covenant with the grantee that I am the lawful owner of said property and that it is free from all incumbrances made or suffered by me.

In Witness Whereof I, the said Sidney P. Brown, being unmarried, have hereunto set my hand and seal this twenty-fourth day of October in the year of our Lord one thousand eight hundred and eighty-five.

SIDNEY P. BROWN. [SEAL.]

Signed, sealed and delivered in presence of
EDWARD O. COOKE.

SUFFOLK, *ss:*

BOSTON, *Oct.* 24, '85.

I hereby acknowledge notice of this deed.

WM. MORTON.

EXHIBIT No. 6.

*Account Annexed.*

| | | | | | |
|---|---|---|---|---|---|
| 1881. | | | | | |
| Aug. | 4 | Cash paid by plaintiff for defendant | $712 | 89 | Item 1 |
| " | " | For merchandise | 64 | 75 | " 2 |
| " | 8 | " " | 55 | 43 | " 3 |
| " | 18 | " Interest | 70 | 04 | " 4 |
| 90 | | | | | |
| Aug. | 23 | For merchandise | 119 | 65 | Item 5 |
| " | 30 | " " | | 21 | " 6 |
| Sept. | 17 | Cash paid by plaintiff for defendant | 600 | 00 | " 7 |
| " | 22 | For merchandise | | 59 | " 8 |
| " | 28 | Cash paid by plaintiff for defendant | 2,316 | 13 | " 9 |
| " | 30 | " " " " " " | 862 | 87 | " 10 |
| Oct. | 15 | " " " " " " | 2,967 | 67 | " 11 |
| " | 22 | For merchandise | 12 | 00 | " 12 |
| " | 28 | Cash paid by plaintiff for defendant | 712 | 86 | " 13 |
| Nov. | 7 | " " " " " " | 721 | 37 | " 14 |
| " | 8 | " " " " " " | 900 | 00 | " 15 |
| " | 28 | " " " " " " | 810 | 20 | " 16 |
| " | " | Money had and received to plaintiff's use | 215 | 43 | " 17 |
| Dec. | 7 | Cash paid by plaintiff for defendant | 721 | 38 | " 18 |
| " | 16 | " " " " " " | 1,002 | 62 | " 19 |
| " | 19 | " " " " " " | 1,005 | 34 | " 20 |
| | | Interest on amount of balance due. | 2,356 | 02 | " 21 |
| | | | $16,227 | 45 | |

Credit Items.

| | | | | | |
|---|---|---|---|---|---|
| Aug. | 3 | Cash | $250 00 | " | 22 |
| " | 8 | " | 150 00 | " | 23 |
| " | 12 | " | 150 00 | " | 24 |
| Aug. | 20 | Cash | 150 00 | " | 25 |
| " | 12 | Merchandise returned | 20 42 | " | 26 |
| " | 18 | Merchandise sent by order of pl'ff. | 11 13 | " | 27 |
| " | 27 | White Sewing Machine | 27 00 | " | 28 |
| Sept. | 16 | Cash | 150 00 | " | 29 |
| " | 20 | 5% on sales 1879 claimed by defendant | 478 04 | " | 30 |
| " | " | Expenses allowed defendant in Attleboro matter | 25 00 | " | 31 |
| " | 28 | Merchandise per inventory Sept. 24 | 1,258 12 | " | 32 |
| " | 28 | Book accounts assigned by def't to Pl'f | 1,035 43 | " | 33 |
| " | " | Furniture and Fixtures 37 Temple Pl. | 250 00 | " | 34 |
| " | " | Lathe and other tools | 100 00 | " | 35 |
| " | 30 | Errors in inventory Sept. 24. claimed by def't | 21 86 | " | 36 |
| 1882. | | | | | |
| Apr. | 10 | Oven sent to Gaylord & Fairchild | 1 75 | " | 37 |
| | | | $4,078 75 | | |

91 EXHIBIT No. 7.

*Copy of Auditor's Report.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Superior Court.

FLORENCE MACHINE COMPANY
*vs.*
ELBRIDGE L. SWEETSER.

Auditor's Report.

Pursuant to the order hereto annexed, I notified the parties to appear before me at my office on the third day of January current at four o'clock in the afternoon, but the defendant not appearing at the time and place appointed and showing no cause for not appearing, I proceeded at the request of the plaintiff to hear the case *ex parte*—and after hearing the plaintiff and examining its vouchers and evidence, I state the account and make report thereof to the Court as follows;

I disallow Item 4 of the account annexed to the ninth Count of the plaintiff's declaration as amended.

I allow interest from Dec. 19, 1881 the date of the last item in the plaintiff's account and when demand for payment was made; and in place of $2356.02 claimed as interest in Item 21, I allow but $2244.27.

I allow the items of credit as stated in said account.

I allow all the other items as stated in said account annexed.

I find the balance due to the plaintiff on Dec. 19, 1881 was $9723.39 and that said sum was reduced Apr. 10, 1882 by a credit of $1.75 as stated in Item 37—leaving as a balance due $9722.64. The ninth count embraces the same causes of action as set forth in the previous counts. I therefore state the account as follows:

| 1881. | | | | Item. |
|---|---|---|---|---|
| Aug. | 4 | Cash paid by plaintiff for defendant... | $712 89 | 1 |
| " | " | For merchandise ..... | 64 75 | 2 |
| " | 8 | " " ..... | 55 43 | 3 |
| " | 23 | " " ..... | 119 65 | 5 |
| " | 30 | " " ..... | 21 | 6 |
| Sept. | 17 | Cash paid by plaintiff for defendant... | 600 00 | 7 |
| " | 22 | For merchandise ..... | 59 | 8 |
| " | 28 | Cash paid by plaintiff for defendant... | 2,316 13 | 9 |
| " | " | " " " " " " ... | 862 87 | 10 |
| Oct. | 15 | " " " " " " ... | 2,967 67 | 11 |
| " | 22 | For merchandise ..... | 12 00 | 12 |
| 92 | | | | |
| Oct. | 28 | Cash paid by plaintiff for defendant... | 712 86 | 13 |
| Nov. | 7 | " " " " " " ... | 721 37 | 14 |
| " | 8 | " " " " " " ... | 900 00 | 15 |
| " | 28 | " " " " " " ... | 810 20 | 16 |
| " | " | Money had and received to plaintiff's use ..... | 215 43 | 17 |
| Dec. | 7 | Cash paid by plaintiff for defendant... | 721 38 | 18 |
| " | 16 | " " " " " " ... | 1,002 62 | 19 |
| " | 19 | " " " " " " ... | 1,005 34 | 20 |
| | | Interest on amount of balance due..... | 2,244 27 | 21 |
| | | | $16,045 66 | |

Credit Items.

| | | | | Item. |
|---|---|---|---|---|
| Aug. | 8 | Cash ..... | 250 00 | 22 |
| " | 8 | " ..... | 150 00 | 23 |
| " | 12 | " ..... | 150 00 | 24 |
| " | 20 | " ..... | 150 00 | 25 |
| " | 12 | Merchandise returned..... | 20 42 | 26 |
| " | 18 | " sent by order of plaintiff. | 11 13 | 27 |
| " | 27 | White Sewing Machine ..... | 27 00 | 28 |
| Sept. | 16 | Cash ..... | 150 00 | 29 |
| " | 20 | 5% on sales 1879 claimed by defendant. | 478 04 | 30 |

| | | | | |
|---|---|---|---|---|
| " 20 | Expenses allowed def't in Attleboro matter | 25 00 | 31 |
| " 28 | Merchandise per inventory Sept. 24... | 1,258 12 | 32 |
| " " | Book account assigned by deft. to pl'ff. | 1,035 43 | 33 |
| " " | Furniture & fixtures 37 Temple Pl.... | 250 00 | 34 |
| " " | Lathe and other tools..... | 100 00 | 35 |
| " 30 | Errors in inventory Sept. 24 claimed by defendant ..... | 21 86 | 36 |
| 1882. Apr. 10 | Oven sent to Gaylord & Fairchild..... | 1 75 | 37 |
| | | $4,078 75 | |
| | Balance due ..... $11,966.91 | | |

I therefore find that at the date of the writ in this action the defendant was indebted to the plaintiff in the sum of eleven thousand nine hundred and sixty six 91/100 dollars ($11966.91) for which sum, with interest from said date, viz, Oct. 24, 1885, it is entitled to judgment.

Jan. 18, 1895.

ALFRED HEMENWAY, *Auditor.*

93 EXHIBIT No. 8.

*Decree of United States District Court.*

*In re* EST. ELBRIDGE L. SWEETSER.

Decree.

February 10, 1904.

Upon the finding of the register and the evidence submitted to the court in the matter of the claims of the Florence Machine Company (John C. Hammond, Assignee) against said estate (being evidence which was introduced before the register), and upon hearing counsel thereon, I find that the findings of the register were correct. I also find that the respondent Hammond is not required to make an election but is entitled to proceed with the equity suit in the State Court without losing his right to dividends under the proofs of claim in bankruptcy.

It is accordingly ordered and decreed:

First. That the findings and decision of the register denying the petition of the assignees, Messrs. Dowse and Kyle, to expunge or reduce said Florence Machine Company claims and establishing the same to the full amount thereof be and the same hereby are approved and affirmed; and

Second. It is ordered that the findings and decisions of the register allowing the motion of John C. Hammond asking to be recognized as the assignee and owner of said claims and to be subrogated to the

rights of the Florence Machine Company, the original claimant be, and the same hereby are, approved and affirmed.

Witness, the Honorable Francis C. Lowell, Judge of the said court, and the seal thereof, at Boston, in said District, on the 10th day of February, A. D. 1904.

F. S. FISKE,
[SEAL.] *Deputy Clerk.*

94 And the cause coming on to be heard by our said Court, was, at the request of the parties, reserved by the Justice who presided at the hearing, for the consideration and determination of the full Court, in the following words, to wit:

95 & 96 COMMONWEALTH OF MASSACHUSETTS, *Suffolk County:*

Supreme Judicial Court. In Equity.

WILLIAM W. WHITTREDGE, of Wakefield, in the County of Middlesex, as He Is Trustee under the Will of Solon O. Richardson, Petitioner,

*v.*

ELBRIDGE L. SWEETSER, of Everett, in said County of Middlesex; WILLIAM B. DOWSE and WARREN O. KYLE, Both Having an Usual Place of Business in Boston, in Suffolk County, as They Are Trustees in Bankruptcy of the Estate of said Sweetser under Proceedings Instituted in 1878 A. D., and MARQUIS F. DICKINSON, JR., Having an Usual Place of Business in said Boston, as He Is Trustee in Bankruptcy of the Estate of said Sweetser under Proceedings Instituted in 1900 A. D., Respondents.

*Reservation.*

At the request of the parties this cause is reserved, upon the pleadings and the agreed facts for the consideration and determination of the full court, such decree to be entered as law and justice may require.

December 21, 1904.

HENRY K. BRALEY, *J. S. J. C.*

97 And thereupon the cause was entered in the Supreme Judicial Court for the Commonwealth.

And afterwards, to wit, on the eleventh day of September, Nineteen hundred and five, the following Rescript was received from the Supreme Judicial Court of the Commonwealth, as follows, viz:

98 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Sept. 8, 1905.

In the case of

WILLIAM W. WHITTREDGE
*vs.*
ELBRIDGE L. SWEETSER ET AL.,

pending in the Supreme Judicial Court for the County of Suffolk, Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.:

Let a decree be entered directing the plaintiffs to pay to the defendants Dowse and Kyle Trustees in bankruptcy, one half of the estate & directing the defendant Hammond to pay the defendants Dowse & Kyle their taxable costs.

By the Court,

C. H. COOPER, *Clerk.*

September 8, 1905.

99 And on the thirty-first day of October, Nineteen hundred and five, the following Final Decree, in accordance with said rescript, was entered by your said Court, to wit:

100 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court. In Equity.

WILLIAM W. WHITTREDGE
*vs.*
ELBRIDGE L. SWEETSER ET AL.

*Final Decree.*

This cause came on to be heard at this sitting and was argued by counsel and thereupon and upon consideration thereof, and in accordance with the rescript of the full court it is ordered, adjudged and decreed as follows:

First. According to the true construction of item eight of the will of Solon O. Richardson set forth in the plaintiff's bill an equitable interest in one half of the trust fund therein mentioned vested in right in Elbridge L. Sweetser at the death of the testator, subject to the life interests of Mary A. Sweetser, Martha Hutchinson and Louisa Richardson.

Second. The complete ownership of said equitable interest, according to the true construction of the United States Bankrupt Law then in force passed to the assignees in Bankruptcy of said Elbridge L. Sweetser by the assignment to them dated March 23d A. D. 1878.

Third. The ownership of said assignees in bankruptcy drew after it possession and said ownership and possession have continued ever since, and all persons barred by United States Revised Statutes, Section 5057, from controverting the same.

101 Fourth. The said assignees in Bankruptcy did not abandon said property, and have not been guilty of laches in relation thereto.

Fifth. The defendants, John C. Hammond, assignee of the Florence Machine Company and assignee of the Monitor Oil Stove Company; Elbridge L. Sweetser; Hannah Sweetser; Marquis F. Dickinson, Trustee in Bankruptcy under Law of 1898, of said Elbridge L. Sweetser; George D. Atkins; William P. Harding; and Solon O. Richardson, have no rights in said equitable interest either by reason of the provisions of United States Revised Statutes, section 5057, or otherwise.

Sixth. Mary A. Sweetser; Martha Hutchinson and Louisa Richardson, all the persons interested in said trust fund as life beneficiaries having deceased, the time provided in said will for the final distribution of said trust property has now arrived.

Seventh. Horace P. Dibble, one of the original assignees in bankruptcy having resigned his trust and having been discharged therefrom by the United States District Court, and Warren Ozra Kyle having been appointed in his place as co-assignee with William B. H. Dowse, one half of said trust fund ought to be conveyed by the petitioner William W. Whittredge the present trustee of said fund to the said Dowse and Kyle, assignees in bankruptcy of said Elbridge L. Sweetser.

Eighth. And the said Whittredge as trustee is hereby ordered to pay over one half of said trust fund to the said Dowse and Kyle, assignees as aforesaid.

102 Ninth. The defendant Hammond shall pay to the defendants Dowse and Kyle their costs of court taxed by the clerk at the sum of $42.26.

By the Court,

JOHN NOBLE, *Clerk.*

October 31, 1905.

103 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said Court to be hereto affixed.

Witness, Marcus Perrin Knowlton, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston in said County, this fourth day of December in the year of our Lord, Ninteen Hundred Five.

[SEAL.] JOHN NOBLE, *Clerk.*

104 UNITED STATES OF AMERICA:

Supreme Court of the United States, October Term.

JOHN C. HAMMOND, Plaintiff in Error,
*vs.*
WILLIAM W. WHITTREDGE, Trustee; WILLIAM B. H. DOWSE and WARREN O. KYLE, Assignees in Bankruptcy of Elbridge L. Sweetser; ELBRIDGE L. SWEETSER, HANNAH SWEETSER, WILLIAM P. HARDING, GEORGE D. ATKINS, SOLON O. RICHARDSON, and MARQUIS F. DICKINSON, Trustee in Bankruptcy of Elbridge J. Sweetser, Defendants.

*Assignment of Errors.*

On a final decree of the Supreme Judicial Court of Massachusetts holden at Boston within and for the County of Suffolk, said decree being entered October 31st A. D. 1905, wherein the said William W. Whittredge of Wakefield in the County of Middlesex is the plaintiff, and the said John C. Hammond of Northampton, in the County of Hampshire, William B. H. Dowse and Warren O. Kyle, both having usual places of business in Boston in said Suffolk County, assignees in bankruptcy of Elbridge L. Sweetser, Elbridge L. Sweetser and Hannah Sweetser, both of Everett, William P. Harding of Cambridge, George D. Atkins of Newton, Solon O. Richardson of Wakefield, all in the County of Middlesex, and Marquis F. Dickinson of Brookline in the County of Norfolk, trustee in bankruptcy of Elbridge L. Sweetser, are defendants and claimants.

And the said John C. Hammond assigns as errors in the record of the process and decree aforesaid the following, to wit:

1. The said John C. Hammond by way of defence and claim in said suit brought against him as aforesaid claimed to have and does claim to have certain titles, rights, privileges and immunities under certain statutes of the United States, and the said final decree is against the said titles, rights, privileges and immunities specially set up and claimed by him said Hammond under said statutes
105 and especially under Sections 5044, 5045, 5046 and 5057 of the United States Revised Statutes relating to assignments in bankruptcy and suits by and against assignees in bankruptcy.

2. In said suit there was drawn in question the construction of certain statutes of the United States and especially the construction of sections 5044, 5045, 5046 and 5057 of the United States Revised Statutes relating to assignments in bankruptcy and suits by and against assignees in bankruptcy and the decision was against the title, right, privilege, or exemption specially set up or claimed under said statutes by said Hammond.

3. It appears by the record that said Hammond is the assignee by mesne assignment of the Florence Machine Company; that on his voluntary petition, Elbridge L. Sweetser, February 23rd, 1878, was adjudged a bankrupt and that on March 23rd, 1878, his assignees

received an assignment executed by the register in usual form; that said Sweetser at the date of his bankruptcy owned an equitable interest vested in right, subject to certain life interests, in a trust fund established by the will of Solon O. Richardson deceased; that in 1881 the assignees of said Sweetser having taken no action as to said equitable interest the Florence Machine Company, a subsequent creditor of said Sweetser by a bill in equity against said Sweetser and the trustees under the will of Solon O. Richardson, undertook to make an equitable attachment of said equitable interest; that the assignees in bankruptcy of Sweetser knew of the bringing of said suit but did not appear to contest it for thirteen years and did not file any answer for eighteen years.

The said Hammond as assignee of the Florence Machine Company now claims said equitable interest under said equitable attachment. He claimed at the trial of the case and now claims, first, that said Sweetser in 1881 under the true construction of Sections 5044, 5045, and 5046 of United States Revised Statutes still had an equitable interest in said trust fund which could be attached and was attached by said suit of the Florence Machine Company; and second, that the assignees of said Sweetser are barred by Section 5057 of United States Revised Statutes from disputing said attachment, and that accordingly his claim to said equitable interest is superior to
106 that of the assignees of Sweetser.

Said Supreme Judicial Court by its said final decree has found, first, that according to the true construction of Sections 5044, 5045 and 5046 of the United States Revised Statutes said Sweetser in 1881 had no equitable interest which could be attached by said Florence Machinen Company, and second, that the said assignees of Sweetser are not barred by Section 5057 of United States Revised Statutes from disputing said attachment and that accordingly the claim of said assignees in bankruptcy of said Sweetser to said equitable interest is superior to that of said Hammond.

This the said Hammond claims is contrary to the true construction of said Sections 5044, 5045, 5046 and 5057, and is error.

4. Said Supreme Judicial Court by its said final decree has found that the complete ownership of said equitable interest of Elbridge L. Sweetser according to the true construction of the United States Bankrupt Law in force in 1878 passed to the assignees in bankruptcy of said Elbridge L. Sweetser by the assignment to them dated March 23, 1878.

This the said Hammond claims is contrary to the true construction of Sections 5044, 5045 and 5046 of the United States Revised Statutes and is error.

5. Said Supreme Judicial Court by its said final decree has found that the ownership of said assignees in bankruptcy drew after it possession and said ownership and possession have continued ever since, and all persons are barred by United States Revised Statutes, Section 5057 from controverting the same.

This the said Hammond claims is contrary to the true construction of said Section 5057 and is error.

6. Said Supreme Judicial Court by its said final decree has found

that the said assignees in bankruptcy did not abandon said equitable interest and have not been guilty of laches in relation thereto.

This the said Hammond claims is error.

7. Said Supreme Judicial Court by its said final decree has found that the said John C. Hammond, assignee of the Florence Machine Company and assignee of the Monitor Oil Stove Company,
107 has no rights in said equitable interest either by reason of the provisions of United States Revised Statutes, Section 5057, or otherwise.

This the said Hammond claims is contrary to the true construction of said Section 5057 and is error.

8. Said Supreme Judicial Court by its said final decree has found that one half of said trust fund (being said Elbridge L. Sweetser's share) ought to be conveyed by the said Whittredge trustee to the said Dowse and Kyle assignees.

This the said Hammond claims is error.

9. Said Supreme Judicial Court by its said final decree has ordered that said Whittredge as trustee pay over one half of said trust fund (being said Sweetser's share) to the said Dowse and Kyle assignees.

This the said Hammond claims is error.

JOHN C. HAMMOND,
By His Attorney, HOLLIS R. BAILEY.

Filed November 15, 1905.

108 [Endorsed:] No. —. John C. Hammond, Plaintiff in Error, *vs.* William W. Whittredge, Trustee, *et al.*, Defendants in Error. Assignment of Error. (Copy.)

109 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *November* 20, 1905.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of William W. Whittredge, trustee, *vs.* Elbridge L. Sweetser, *et als.*, trustees, decided on the 8th day of September, 1905.

HENRY WALTNESHIFT,
*Reporter of Decisions.*

110 LORING, *J.:*

This is a bill for instructions brought by the plaintiff as the present trustee of certain property held in trust under item 8 of the will of Solon O. Richardson. The case was reserved for the consideration of this court on an agreed statement of facts. From this statement it appears that Solon died in 1873, and by his last will and testament, which was duly allowed, bequeathed $35,000 on the following trusts: The income to be paid to his three sisters for life, namely, Mary A. Sweetser, Martha Hutchinson, and Louisa Richardson; and "at the decease of my said sisters, or either of them, my will is that the share belonging to the deceased sister shall revert to

her children, to be shared by them each and each alike; if either of my said sisters shall die childless, the income belonging to her I direct shall revert to the said sisters surviving, to be shared equally between them. At the decease of all my three said sisters, I
111 direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever." The three life tenants survived the testator. Louisa never had any child; Martha Hutchinson had one child, now the wife of the plaintiff; and Mary A. Sweetser had one child, a son, Elbridge L. Sweetser. Both of these children, Mrs. Whittredge and Elbridge L. Sweetser, were born in the lifetime of the testator.

Mary A. Sweetser survived her sisters, and died December 15, 1900, leaving her son and her niece her surviving. On February 1, 1901, this bill was brought to find out who was entitled now to receive Elbridge L. Sweetser's half of the fund. This half is claimed by assignees in bankruptcy of Elbridge under a petition filed in 1878. It is also claimed by John C. Hammond, who now owns a judgment rendered in February, 1896, in favor of a creditor of Elbridge, founded on five notes dated in 1881. Hammond is also the present holder under one of two creditors to whom an assignment was made in October, 1885, to secure two debts incurred after this bankruptcy.

No other claimants have appeared before us.

The defendant Hammond admits that when the testator died Elbridge had either a vested remainder in one half of the trust fund of $25,000 subject to the life estates created by this item of the will, and subject to the class being opened on the birth of a further child or children of the life tenants, or a vested interest in a contingent remainder, and that "in either case" his interest was "assignable."

112 His contention however is that the assignees are barred by U. S. Rev. sts. s. 5057.

The title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder. In this Commonwealth notice to the trustees is not necessary to complete the title of an assignee of an interest in the property held in trust by them. Thayer *v.* Daniels, 113 Mass. 129, and cases there cited. See also Putnam *v.* Story, 132 Mass. 205; Butterfield *v.* Reed, 160 Mass. 362. By virtue of the assignment in bankruptcy, the complete ownership in this incorporeal interest in this personal property became vested in the assignees, and the ownership drew after it possession, so far as the interest here in question (an incorporeal interest because an interest in remainder) is capable of possession. This result is not affected by the fact that the assignees were for a time ignorant of the existence of this property of the bankrupt. This ownership and possession in the assignees, has continued ever since, and all persons are barred by U. S. Rev. Sts. s. 5057, from controverting it. The contention that one in possession of property is barred from exercising the rights which that ownership confers on

the owner by not having brought an action is groundless. Under these circumstances we have not found it necessary to choose between the opinion in Dushane *v.* Beale, 161 U. S. 513, and the decision in Rock *v.* Dennett, 155 Mass. 500.

The only other contention made by the defendant Hammond is equally groundless, to wit, that the assignees abandoned this property. The contention is put on the ground that they did not
113 sell their interest in remainder in this fund. Were that all that appeared the argument would be without merit. But that is not all. In 1882 the assignees filed a bill in which they "prayed, among other things, that the said Elbridge L. Sweetser might be directed to execute and deliver such instruments as would convey to said assignees all his interest as legatee under the said will, and that the said trustee, Solon O. Richardson, might be enjoined from paying to the said Elbridge L. Sweetser, or any person or persons claiming under him, any part of the said trust fund, or the income thereof, which might accrue and become payable to the said Elbridge L. Sweetser." This bill apparently was brought by the assignees as soon as they learned of the existence of the fund and of the fact that creditors of Elbridge were seeking to reach and apply this interest of Elbridge in satisfaction of the debt due from him to them. The bringing of this bill (which seems to have been a bill in the nature of a bill *quia timet*) disposes of the contention that it was in fact the intention of the assignees to abandon this property.

Under the circumstances, the defendant Hammond should pay to the defendants Dowse and Kyle their taxable costs.

Decree accordingly.

113½ [Endorsed:] Whittredge *vs.* Sweetser. Certified copy of the opinion of the Supreme Judicial Court.

114 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William W. Whittredge of Wakefield in the county of Middlesex trustee, William B. H. Dowse of Newton in the county of Middlesex and Warren O. Kyle of Brookline in the county of Norfolk assignees in bankruptcy of Elbridge L. Sweetser of Provincetown in the county of Barnstable, said Elbridge L. Sweetser, Hannah Sweetser of said Provincetown Solon O. Richardson of said Wakefield, George D. Atkins of said Newton, William P. Harding of Cambridge in said county of Middlesex and Marquis F. Dickinson of Brookline in the county of Norfolk trustee in bankruptcy of said Elbridge L. Sweetser all in the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, on the * fourteenth day of December next, pursuant to a Writ of Error filed in the Clerk's Office of the † Supreme Judicial Court of Massachusetts wherein John C. Hammond of Northampton in the county

of Hampshire and Commonwealth of Massachusetts is the plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton Chief Justice of the Supreme Judicial Court of Massachusetts, this fifteenth day of November, in the year of our Lord one thousand nine hundred and five.

MARCUS P. KNOWLTON,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

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* Not exceeding 30 days from the day of signing.
† Name of Court to which Writ of Error is directed.

115 Service of the within citation is hereby accepted.
WILLIAM W. WHITTREDGE,
*Trustee,*
By his att'y, M. E. S. CLEMONS.
WM. B. H. DOWSE AND
WARREN O. KYLE, *Assignees,*
By their att'y, FRED. JOY.
ELBRIDGE L. SWEETSER,
By his att'y, WILLIS W. STOVER.
HANNAH SWEETSER,
By her att'y, GEO. A. BROWN.
SOLON O. RICHARDSON,
By his att'y, C. N. TYLER.
GEORGE D. ATKINS,
By his att'y, CHESTER A. REED.
MARQUIS F. DICKINSON, *Trustee,*
By his att'ys, DICKINSON, FARR & DICKINSON.

Service of the annexed citation is hereby accepted.
WM. P. HARDING, *Pro Se.*

Los Angeles, Cal'a, Nov. 27, 1905.

116 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of the Supreme Judicial Court within and for the County of Suffolk, hereby certify that the foregoing are true copies of

I. The Record in the case of William W. Whittredge, Trustee, Petitioner, *vs.* Elbridge L. Sweetser *et als.*, in Equity, in said Supreme Judicial Court determined;—and Annexed to and transmitted with said Record, of

II. The Assignment of Errors.

III. The opinion of the Full Court and of all the proceedings

said case, with all things concerning the same—together with

7 IV. The Original Citation and the Return of Service, thereon.

In witness whereof I have hereunto set my hand and the seal of id Court this fourth day of December in the year of our Lord, One ousand nine hundred and five.

[SEAL.] JOHN NOBLE, *Clerk.*

8 (Copy.)

*Bond on Writ of Error.*

Know all men by these presents, That we, John C. Hammond of orthampton in the county of Hampshire and Commonwealth of assachusetts, as principal, and the American Surety Company of ew York a corporation having a usual place of business in Boston the county of Suffolk in said Commonwealth, as surety, are held d firmly bound unto William W. Whittredge of Wakefield in the unty of Middlesex as he is trustee under the will of Solon O. chardson, deceased, William B. H. Dowse of Newton in the unty of Middlesex, and Warren O. Kyle of Brookline in the unty of Norfolk as they are assignees in bankruptcy of Elbridge Sweetser lately of Everett in said county of Middlesex and now of rovincetown in the county of Barnstable, said Elbridge L. Sweetser, annah Sweetser lately of said Everett and now of said Province-wn, Solon O. Richardson of said Wakefield, George D. Atkins of id Newton, William P. Harding of Cambridge in said county of iddlesex, and Marquis F. Dickinson of Brookline in the county of orfolk as he is trustee in bankruptcy of said Elbridge L. Sweetser ader the law of 1898 in the full and just sum of five hundred dol-rs to be paid to the said William W. Whittredge trustee as afore-id, or his successor in office, the said William B. H. Dowse and arren O. Kyle assignees as aforesaid or their successors in office, e said Elbridge L. Sweetser, the said Hannah Sweetser, the said olon O. Richardson, the said George D. Atkins, the said William Harding, and the said Marquis F. Dickinson trustee as afore-id or his successor in office and their certain attorney, executors, dministrators or assigns; to which payment, well and truly to be ade, we bind ourselves, our heirs, executors, administrators and ccessors jointly and severally by these presents. Sealed with our als and dated this thirtenth day of November in the year of our ord one thousand nine hundred and five.

Whereas, lately at a sitting of the Supreme Judicial Court of the ommonwealth of Massachusetts at Boston within and for the county Suffolk in a suit depending in said Court, between said William . Whittredge trustee, plaintiff, and said John C. Hammond, said illiam B. H. Dowse and Warren O. Kyle, assignees in bankruptcy Elbridge L. Sweetser, said Elbridge L. Sweetser, said Hannah Sweetser, said Solon O. Richardson, said George D. Atkins,

9 said William P. Harding and said Marquis F. Dickinson trustee in bankruptcy of said Elbridge L. Sweetser defend-

ants and claimants, a decree was rendered against the said John C. Hammond and the said John C. Hammond having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Whittredge trustee, Dowse and Kyle assignees, Elbridge L. and Hannah Sweetser, said Richardson, Atkins, Harding and Dickinson trustee citing and admonishing them to be and appear in the Supreme Court of the United States in the City of Washington on the — Monday of December next.

Now, the condition of the above obligation is such, That if the said John C. Hammond shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN C. HAMMOND. [SEAL.]
AMERICAN SURETY COMPANY OF NEW YORK,
By ELIPHALET F. PHILBRICK,
*Resident Vice President.*

Sealed and delivered in presence of
HOLLIS R. BAILEY to J. C. H.
L. LOY, Witness to A. S. Co.

Attest:

FRED L. ROBERTS,
[CORPORATE SEAL.] *Resident Ass't Secretary.*

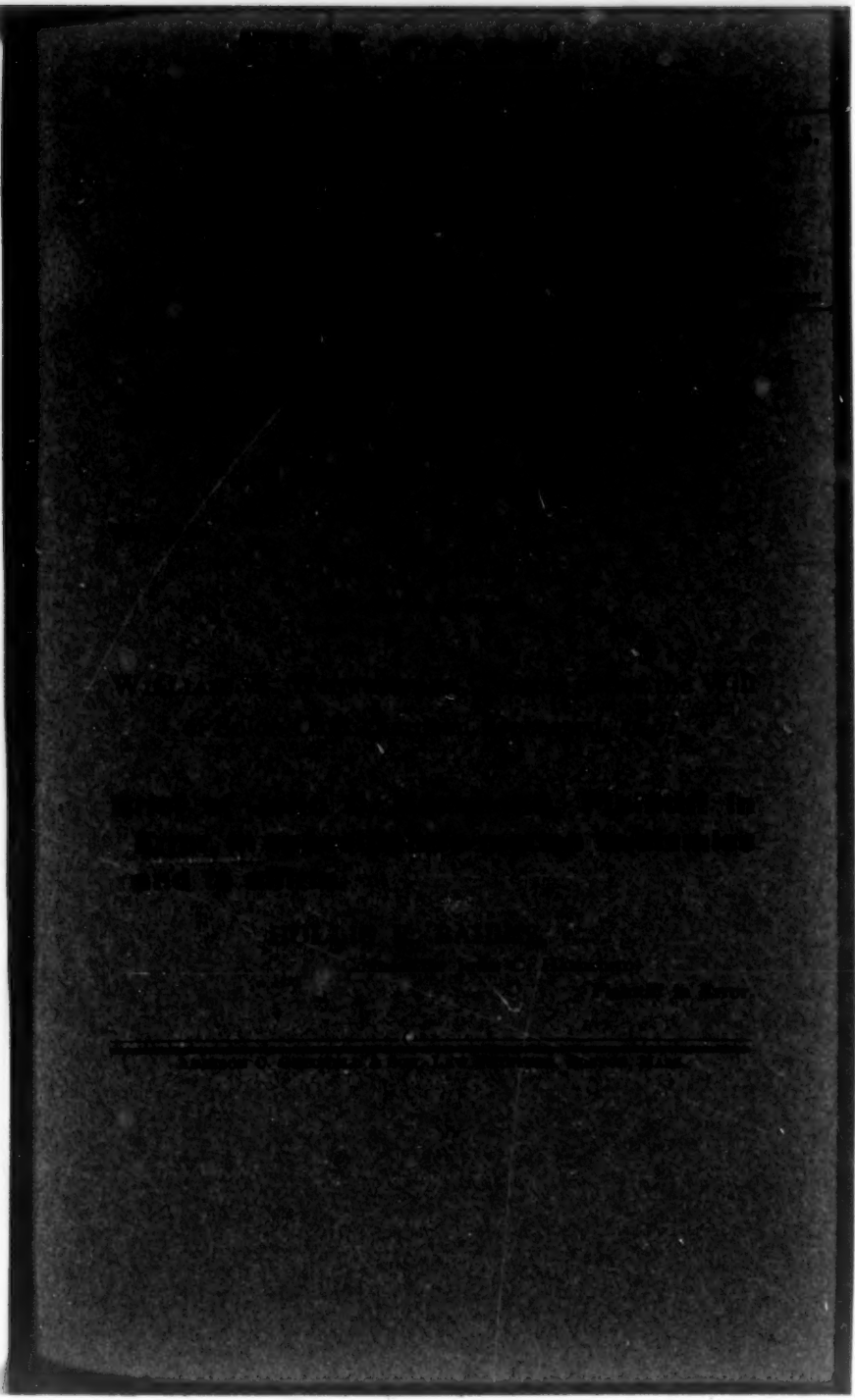
Approved:

MARCUS P. KNOWLTON,
*Chief Justice of Supreme Judicial Court of Massachusetts.*

A true copy of said Bond.
Attest:

JOHN NOBLE, *Clerk.*

[Endorsed:] 7381. Bond. (Copy.)
Endorsed on cover: File No. 20,015. Massachusetts supreme judicial court. Term No. 164. John C. Hammond, plaintiff in error, *vs.* William W. Whittredge, trustee under the will of Solon O. Richardson, deceased, *et al.* Filed December 11th, 1905. File No. 20,015.



# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 164.

JOHN C. HAMMOND,
PLAINTIFF IN ERROR,

v.

WILLIAM W. WHITTREDGE, Trustee under the Will of Solon O. Richardson, Deceased, *et al.*

## Brief of John C. Hammond, Plaintiff in Error, in opposition to motion to dismiss and to affirm.

### I.

### Concise Statement of Case.

The property in dispute consists of a future contingent equitable interest under the will of Solon O. Richardson, who died in 1873.

The plaintiff in error, John C. Hammond, claims the fund under an equitable attachment made in November, 1881, by the Florence Machine Company in a suit against Elbridge L. Sweetser.

The defendants in error, Dowse and Kyle, claim said

fund as assignees in bankruptcy of said Sweetser under a bankruptcy assignment dated March 23, 1878.

The value of this equitable interest of the bankrupt Elbridge L. Sweetser in 1878 depended largely upon his outliving three life beneficiaries. During the three years following the bankruptcy the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same or were ready to do so.

The equitable attachment of the Florence Machine Company was made to secure payment of promissory notes given by Sweetser after the bankruptcy. The assignees in bankruptcy, Dowse and Kyle, knew of the equitable attachment in 1882, but did not intervene for over sixteen years.

The plaintiff in error, John C. Hammond, claims that in November, 1881, the bankrupt Sweetser had such an amount of title that the Florence Machine Company, by its equitable attachment, was able to assert a claim to his equitable interest adverse to that of his assignees in bankruptcy. He claims further that the assignees, if they wished to contest the validity of this adverse claim, were bound to proceed within two years under the provisions of section 5057 of United States Revised Statutes.

The defendants in error claim that after the bankruptcy assignment the title of the assignees was so complete that no adverse claim could be asserted by means of an attachment. The federal questions involved are well stated in the assignment of errors.

See Assignment of Errors, Record, pp. 59, 60.
See Final Decree, Record, pp. 57, 58.
See Answer of Dowse and Kyle, Assignees in Bankruptcy, Record, pp. 5, 6.

See Amended Answer of John C. Hammond, Record, pp. 14–17.
See Agreed Facts, Record, pp. 35, 39.

## II.
## First Federal Question.

The defendants in error, Messrs. Dowse and Kyle, claim the fund in question as assignees in bankruptcy of Elbridge L. Sweetser, under an assignment in bankruptcy made in March, 1878.

See Answer of Dowse and Kyle, Record, p. 6.

The final decree (See Record, p. 57) says, —

> "the complete ownership of said equitable interest according to the true construction of the United States Bankrupt Law then in force passed to the Assignees in Bankruptcy of said Elbridge L. Sweetser by the assignment to them dated March 23d A.D. 1878."

The United States bankrupt law in force in 1878 governing assignments in bankruptcy is contained in sections 5044, 5045, and 5046 of United States Revised Statutes.

The plaintiff in error claimed, and now claims, that the true meaning and effect of said federal statutes was different from that found by the Supreme Judicial Court of Massachusetts.

He claims that, according to the weight of authority, a bankrupt, even after an assignment in bankruptcy, has a certain amount of title to the assets of his estate in bankruptcy.

He claims that the assignees may become estopped from

asserting a title as against the bankrupt, or persons claiming under him.

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, 620, SHIRAS, J., says, —

> "It is for the assignee to determine whether or not in a given case he will assert his right to property. . . . This election he must exercise within a reasonable time. A failure to do so may as against third parties be construed as an election not to claim the property. . . . In January, 1883, when the attention of the assignee was directly called to the property he did not take the steps necessary to assert his right to the property. . . . Under these circumstances the assignee should now be estopped from asserting any right or title to the property against the defendant."

See *Sparhawk* v. *Yerkes*, 142 U.S. 1, 13.
*Sessions* v. *Romadka*, 145 U.S. 29, 39.
*Amory* v. *Lawrence*, 3 Clifford, 523, 536.
*Smith* v. *Gordon*, 6 Law Rep. 317.

It appears by the agreed facts (see Record, pp. 34, 35, 39) that the property in question in 1878, at the time of the bankruptcy, consisted of a future contingent equitable interest, the value of which depended largely upon the bankrupt's outliving three life beneficiaries. During the three years following the bankruptcy, *i.e.*, from March, 1878, to November, 1881, the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same, or were ready to do so. In November, 1881, the Florence Machine Company, a subsequent creditor of the bankrupt, made an equitable

attachment of this interest by a bill in equity against the bankrupt and the trustee holding the fund. (See Record, p. 35.)

By this attachment the Florence Machine Company asserted a claim to said equitable interest adverse to that of said assignees.

The assignees in bankruptcy knew of this suit in 1882, but did not intervene for over sixteen years. To use the language of Mr. Justice SHIRAS, "They did not take the steps necessary to assert their rights to the property."

To use the language of Chief Justice FULLER in *Sparhawk* v. *Yerkes*, 142 U.S. 1, 14, they "contented themselves with the hope that masterly inactivity might enable them to assert a claim if the asset finally proved of value."

The plaintiff in error claims that, according to the true construction of the above-named sections of the bankrupt law relating to assignments, the bankrupt Sweetser had such an amount of title to this contingent interest that a subsequent creditor could, by an equitable attachment of the same, assert an interest adverse to that of the assignees.

The question is not whether the bankrupt had a complete title, but whether he had such an amount of title that a subsequent creditor could, by an attachment, assert an interest adverse to that of the assignees. If he could by such an attachment assert an adverse interest, it follows that the assignees were bound, at their peril, to take proper steps to maintain their rights.

In *Dushane* v. *Beall*, 161 U.S. 513, a subsequent creditor attached certain assets twelve years after the bankruptcy. It was assumed that the attachment was so far good as to make it incumbent upon the assignees to intervene seasonably and dispute the same.

## III.
## Second Federal Question.

The plaintiff in error, John C. Hammond, claims title under an equitable attachment made by the Florence Machine Company November 28, 1881. (See Amended Answer of John C. Hammond, Record, p. 14. See also Agreed Facts, Record, p. 35.)

He claims that the bankrupt in 1881, in spite of the bankruptcy, under the existing circumstances had an attachable interest, and that (the attachment being made, and the assignees being informed of it) the assignees were bound to intervene within two years, and assert their title. (See U.S. Rev. Sts. sec. 5057.) He also claims that, apart from section 5057, the assignees were bound to intervene and assert their title within a reasonable time. Not having intervened for over sixteen years they are now barred and estopped from asserting title as against the attaching creditor.

It appears from the opinion of the Supreme Judical Court of Massachusetts (see Record, pp. 61–63) that the Court, without much consideration, in effect held that the title of the assignees was so complete that the bankrupt had no attachable interest, and the assignees were not bound to intervene and assert their title in the attachment suit. This, the said Hammond claims, was error which ought to be corrected.

In *Squire* v. *Lincoln*, 137 Mass. 399, 405, FIELD, J., says, —

> "We are of opinion that if the assignee having notice of the suit does not intervene it is not open to these defendants to set up this defence; it is presumed

then that the assignee assents to the plaintiffs prosecuting the suit."

In the case at bar the assignees knew of the suit, and did not intervene for over sixteen years.

The said Hammond duly raised the point that said intervention was too late. (See Hammond's Amended Answer, Record, p. 17. See Agreed Facts, Record, p. 42.)

## IV.

## Third Federal Question.

The Massachusetts Court, by their final decree, find that the attachment suit was barred by section 5057. (See Record, p. 58, at top.) This was manifestly error. The assignees had not pleaded this statute as a bar, and the point was not open to them. This finding, moreover, is contrary to the decisions.

See *Rock* v. *Dennett*, 155 Mass. 500.
*Avery* v. *Cleary*, 132 U.S. 604.

In regard to the true meaning and effect of section 5057 of United States Revised Statutes there is some conflict of authority.

The cases—

*Bailey* v. *Glover*, 21 Wall. 342, 346, 347;
*Rock* v. *Dennett*, 155 Mass. 500;
*Pritchard* v. *Chandler*, 2 Curtis C.C. 488;
*Walker* v. *Towner*, 16 N.B.R. 285, 287;
*Avery* v. *Cleary*, 132 U.S. 604,—

hold that the statute (sec. 5057) applies to adverse claims made by third parties after the bankruptcy, and that assignees are bound to dispute such claims within two years of the time when they are asserted.

The case of —

*Dushane* v. *Beall*, 161 U.S. 513, —

without referring to the above cases, takes a different view.

What was said in *Dushane* v. *Beall* was merely dictum, as the assignees in that case intervened within eight months to dispute the adverse claim.

The plaintiff in error claims that, according to the weight of authority, whenever, after the bankruptcy assignment, adverse claims are properly asserted against the assets, either by attachment or adverse possession or otherwise, the assignees are bound, under section 5057, to proceed in court against the adverse claimant within two years, to maintain their rights.

## V.

## Abandonment and Laches.

The inferences of the Massachusetts Court that the assignees were not guilty of laches and did not abandon this equitable interest, are not decisive of the question, — Did the bankrupt, in 1881, have such an interest that an equitable attachment could be made, and the assignees placed under a duty of resisting the same?

These inferences, moreover, are open to revision by this Court. The case was heard by the full bench of the Supreme Judicial Court of Massachusetts upon agreed facts, and its inferences are inferences of law, and, so far as federal questions are involved, may be reconsidered by this Court.

*Mayhew* v. *Durfee*, 138 Mass. 584.

*Jaquith* v. *Winnisimmet National Bank*, 182 Mass. 57.

## VI.
## Writ of Error Not Premature.

The defendants in error, Dowse and Kyle, in their brief assert that at the date the writ of error was allowed there was no final decree because there was still a right of appeal. This point is not well taken. The final decree (see Record, p. 57) was entered in accordance with a rescript of the full court. Under this rescript of the full court the case was not remitted for further proceedings, but simply for the entry of the decree directed. (See Record, p. 57.)

*Mower* v. *Fletcher*, 114 U.S. 127.
*Chesapeake &c. Co.* v. *Manning*, 186 U.S. 238.

As appears by the reservation (see Record, p. 56), the parties agreed that the full court might direct such a decree as law and justice might require. The decree entered is in accordance with the direction of the full court, and must be considered as final. No decree in Massachusetts ever was or ever can be more final than this.

## VII.
## Conclusion.

The plaintiff in error claims that important and interesting federal questions are raised by the record in this case. He desires an opportunity to discuss these questions at some length at the proper time, and asks that the motion to dismiss may be overruled, with costs.

Respectfully submitted,
HOLLIS R. BAILEY,
Counsel for JOHN C. HAMMOND,
Plaintiff in Error.

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# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 184.

JOHN C. HAMMOND,

PLAINTIFF IN ERROR,

v.

WILLIAM W. WHITTREDGE, Trustee under the Will of Solon O. Richardson, Deceased, *et al.*

## Brief of John C. Hammond, Plaintiff in Error.

HOLLIS R. BAILEY,
Counsel for JOHN C. HAMMOND,
Plaintiff in Error.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON, MASS.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 164.

JOHN C. HAMMOND,
PLAINTIFF IN ERROR,

v.

WILLIAM W. WHITTREDGE, Trustee under the Will of Solon O. Richardson, Deceased, *et al.*

## Brief of John C. Hammond, Plaintiff in Error.

### I.

### Concise Statement of Case.

The property in dispute consists of a future contingent equitable interest under the will of Solon O. Richardson, who died in 1873.

The plaintiff in error, John C. Hammond, claims the fund under an equitable attachment made in November, 1881, by the Florence Machine Company in a suit against Elbridge L. Sweetser.

The defendants in error, Dowse and Kyle, claim said fund as assignees in bankruptcy of said Sweetser under a bankruptcy assignment dated March 23, 1878.

The value of this equitable interest of the bankrupt Elbridge L. Sweetser in 1878 depended largely upon his

outliving three life beneficiaries, one of whom, as it turned out, lived until December, 1900. During the three years following the bankruptcy the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same, or were ready to do so. The bankrupt had obtained his discharge before the date of the equitable attachment.

The equitable attachment of the Florence Machine Company was made to secure payment of promissory notes given by Sweetser after the bankruptcy. The assignees in bankruptcy, Dowse and Kyle, knew of the equitable attachment in 1882, but did not intervene for over sixteen years.

The plaintiff in error, John C. Hammond, claims that in November, 1881, the bankrupt Sweetser had such an amount of title that the Florence Machine Company, by its equitable attachment, was able to assert a claim to his equitable interest adverse to that of his assignees in bankruptcy. He claims, further, that the assignees, if they wished to contest the validity of this adverse claim, were bound at their peril to proceed within two years under the provisions of section 5057 of United States Revised Statutes. He claims, further, that, apart from United States Rev. Sts. sec. 5057, the assignees were bound to intervene within a reasonable time in said attachment suit if they wished to dispute the validity of the attachment, and that their delay of over sixteen years was unreasonable.

The defendants in error claim that after the bankruptcy assignment the title of the assignees was so complete that no adverse claim could be asserted by means of an attachment.

The case was reserved for the consideration of the full bench of the Supreme Judicial Court of Massachusetts

upon the pleadings and the agreed facts. The decree complained of was entered in accordance with the opinion and rescript of the full bench.

The errors assigned are nine in number, but the questions really involved are only four:

(1) Did the bankrupt Sweetser, in November, 1881, have such an amount of title in the equitable interest in question that the Florence Machine Company could make an equitable attachment?

(2) Did the attachment made by the Florence Machine Company render it necessary for the assignees at their peril to intervene and contest the same within two years, in accordance with United States Rev. Sts. sec. 5057?

(3) Assuming that the assignees were not bound by section 5057 of United States Revised Statutes to intervene within two years, were they bound to intervene at their peril within a reasonable time?

(4) Was the Florence Machine Company, in November, 1881, barred by United States Rev. Sts. sec. 5057, from bringing its attachment suit?

The decree was against the plaintiff in error on all these points. He claims that it was erroneous.

## II.

## Specification of Errors relied on.

The plaintiff in error relies upon each of the nine errors specified. There is, however, a certain amount of repetition in the several assignments of error, and a consideration and decision of the four following assignments of error will doubtless be decisive as to the others: —

> "3. It appears by the record that said Hammond is the assignee by mesne assignment of the Florence

Machine Company; that on his voluntary petition, Elbridge L. Sweetser, February 23rd, 1878, was adjudged a bankrupt and that on March 23rd, 1878, his assignees received an assignment executed by the register in usual form; that said Sweetser at the date of his bankruptcy owned an equitable interest vested in right, subject to certain life interests, in a trust fund established by the will of Solon O. Richardson deceased; that in 1881 the assignees of said Sweetser having taken no action as to said equitable interest the Florence Machine Company, a subsequent creditor of said Sweetser by a bill in equity against said Sweetser and the trustees under the will of Solon O. Richardson, undertook to make an equitable attachment of said equitable interest; that the assignees in bankruptcy of Sweetser knew of the bringing of said suit but did not appear to contest it for thirteen years and did not file any answer for eighteen years.

"The said Hammond as assignee of the Florence Machine Company now claims said equitable interest under said equitable attachment. He claimed at the trial of the case and now claims, first, that said Sweetser in 1881 under the true construction of Sections 5044, 5045, and 5046 of United States Revised Statutes still had an equitable interest in said trust fund which could be attached and was attached by said suit of the Florence Machine Company; and second, that the assignees of said Sweetser are barred by Section 5057 of United States Revised Statutes from disputing said attachment, and that accordingly his claim to said equitable interest is superior to that of the assignees of Sweetser.

"Said Supreme Judicial Court by its said final de-

cree has found, first, that according to the true construction of Sections 5044, 5045 and 5046 of the United States Revised Statutes said Sweetser in 1881 had no equitable interest which could be attached by said Florence Machine Company, and second, that the said assignees of Sweetser are not barred by Section 5057 of United States Revised Statutes from disputing said attachment and that accordingly the claim of said assignees in bankruptcy of said Sweetser to said equitable interest is superior to that of said Hammond.

"This the said Hammond claims is contrary to the true construction of said Sections 5044, 5045, 5046 and 5057, and is error."

"5. Said Supreme Judicial Court by its said final decree has found that the ownership of said assignees in bankruptcy drew after it possession and said ownship and possession have continued ever since, and all persons are barred by United States Revised Statutes, Section 5057 from controverting the same.

"This the said Hammond claims is contrary to the true construction of said Section 5057 and is error."

"6. Said Supreme Judicial Court by its said final decree has found that the said assignees in bankruptcy did not abandon said equitable interest and have not been guilty of laches in relation thereto.

"This the said Hammond claims is error."

"7. Said Supreme Judicial Court by its said final decree has found that the said John C. Hammond, assignee of the Florence Machine Company and assignee of the Monitor Oil Stove Company, has no rights in said equitable interest either by reason of the provisions of United States Revised Statutes, Section 5057, or otherwise.

"This the said Hammond claims is contrary to the true construction of said Section 5057 and is error."

## III.
## Brief of the Argument.
### A.
### First Question.

The plaintiff in error claims that, according to the true construction of sections 5044, 5045, and 5046 of United States Revised Statutes (being the sections relating to assignments in bankruptcy) the bankrupt Sweetser, in November, 1881, had such an amount of title to the asset in question that the Florence Machine Company could, by making an equitable attachment, render it necessary for the assignees to take proper steps to resist the same.

It is well settled that a bankrupt has a good title to his assets as against all the world except his assignees in bankruptcy.

Under the later English law a bankrupt may maintain an action against a debtor, unless there is interference on the part of the assignees.

In *Clark* v. *Calvert*, 3 J. B. Moore, 96, 112, Lord Chief Justice DALLAS says, —

> "It seems clear that as against all the world except the assignees the bankrupt has a clear right of action. . . ."

In *Herbert* v. *Sayer*, 5 Q.B. 965, 975, TINDAL, C.J., says, —

> "And the question is whether he has a good right to such property against the parties to the bill and all the world except the assignees or no right whatever,

so that he could not sue at all upon the bill. We are of opinion that he has a good right except as against the assignees; and as the plea does not state that they have interfered it does not contain a complete defence."

This case, to be sure, related to after-acquired property, but was under a statute which provided that all present and future assets should pass to the assignees, the language of the statute being the broadest possible.

See also *Semple* v. *London & Birmingham Railway*, 2 Jurist, 296.

*Fyson* v. *Chambers*, 9 M. & W. 460.

The law in Massachusetts is equally well settled to the same effect.

In *Gay* v. *Kingsley*, 11 Allen, 348, CHAPMAN, J., says, —

"The plaintiff has the title against all persons except the assignee and may enforce it if the assignee does not intervene. . . . He might hold it [the note] as his own if the assignee with knowledge of its existence declined to claim it."

In *Mayhew* v. *Pentecost*, 129 Mass. 332, GRAY, C.J., says, —

"The question whether an action upon a right belonging to the bankrupt at the time of the commencement of the proceedings in bankruptcy can be brought in his name with the consent of the assignee does not appear to have been decided by the Supreme Court of the United States . . . no bankrupt act of the United States has undertaken to prohibit suits upon debts due

> to the bankrupt before the bankruptcy to be brought in the name of the bankrupt with the consent of the assignee, in the courts of those states whose judicial procedure and practice allow suits to be so brought."

As we shall presently show, this assent of the assignee may be given after the suit is brought, and may be inferred from his failure to seasonably object when he learns of the suit.

In *Herring* v. *Downing*, 146 Mass. 10, an insolvent debtor sued on a contract made with the defendant before the insolvency. The insolvent debtor never called the attention of his assignee to the claim, did not insert it in his schedule of assets, and never conversed about the subject with the assignee.

The defendant asked the judge to rule that upon this evidence the action could not be maintained because the right of action had vested in the assignee.

HAMMOND, J., the trial judge, refused so to rule, and instructed the jury, —

> "that the action might be maintained with the assent of the assignee and that it was competent for the jury to find such assent from the assignee's knowledge of the pendency of the suit, his non-interference with it and his attendance at the hearing before the auditor and at the trial in the Superior Court."

Exceptions to this instruction were overruled.

This is a strong authority in favor of the plaintiff in error. The plaintiff was held entitled to maintain the suit by reason of the conduct of the assignee after he learned that the suit had been brought. The assignee had never

heard of the asset until after the insolvent debtor brought suit. Abandonment by the assignee prior to the bringing of the suit was not deemed a prerequisite to the insolvent's right to commence the action.

See also *Fogg* v. *Willcut*, 1 Cush. 300.
*Drury* v. *Vannevar*, 5 Cush. 442.
*Stone* v. *Hubbard*, 7 Cush. 597.
*Robinson* v. *Hall*, 11 Gray, 483.
*Norcross* v. *Pease*, 5 Allen, 331.
*Wonson* v. *Pew*, 148 Mass. 299.
*Atwood* v. *Bailey*, 184 Mass. 133.

The law in Maine is the same.

In *Lancey* v. *Foss*, 88 Me. 215, EMERY, J., says, —

> "Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors."

This was the case of a bankrupt under the act of 1867, United States Rev. Sts., sec. 5046, as in the case at bar.

The asset was not scheduled, but the assignee was presumed to have known of it, and to have elected not to take it.

See also *Sawtelle* v. *Rollins*, 23 Me. 196.
*Nash* v. *Simpson*, 78 Me. 142, 152.
*Fleming* v. *Courtenay*, 98 Me. 401, 410.

The federal law is similar.

In *Smith* v. *Gordon*, 6 Law Reporter, 313, 317, Mr. Justice WARE (of United States District Court, Maine) says, —

> "And I take the principle to be a general one that the assignee is not at least ordinarily bound to take into his possession property which will be a burthen instead of a benefit to the estate. If the assignee elects not to take, the property remains in the bankrupt and no one has a right to dispute his possession. His possessory title is good against all the world but his assignee."

In *Amory* v. *Lawrence*, 3 Clifford, 523, 535, CLIFFORD, J., says, —

> "and if he [the assignee] elects not to take the property it remains in the bankrupt and no one certainly, except the assignee, has a right to dispute his possession."

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, 670, SHIRAS, J., says, —

> "It is for the assignee to determine whether or not in a given case he will assert his right to property. . . . This election he must exercise within a reasonable time. A failure to do so may as against third parties be construed as an election not to claim the property."

In *Glenny* v. *Langdon*, 98 U.S. 20, 31, Mr. Justice CLIFFORD says, —

> "It has long been a recognized principle of the bankrupt law, says Robson, that the assignees of a bankrupt are not in certain cases bound to take property of an onerous or unprofitable character."

In the case at bar the interest of the bankrupt was so contingent as to have no immediate money value and

evidently was unprofitable so far as the creditors of the estate were concerned.

In *Sparhawk* v. *Yerkes*, 142 U.S. 1, 13, Chief Justice FULLER says, —

> "They were not bound however to accept property of an onerous and unprofitable nature which would burden instead of benefiting the estate and they could elect whether they would accept or not after due consideration and within a reasonable time, while if their judgment was unwisely exercised the bankruptcy court was open to the creditors to compel a different conclusion."

See also *Dushane* v. *Beall*, 161 U.S. 513.

In *Sessions* v. *Romadka*, 145 U.S. 29, 51, Mr. Justice BROWN says, —

> "We are of opinion however that this rule does not apply where the assignee before the expiration of the statutory time elects to abandon the property to the bankrupt. In such case abandonment relates back to the commencement of the proceedings in bankruptcy and the title stands as if no assignment had been made. Such abandonment is not so much a transfer of an existing interest in the assignee as an election on his part to treat the assignment as having never included that claim."

It appears from the foregoing cases that where the asset is contingent in its nature and of doubtful value, and the assignees have for a long time omitted to take any action in

regard to it, the bankrupt has such an amount of title that he can make a conveyance or bring a suit concerning it. If the assignees having notice fail to take proper steps to assert their rights they will be barred.

The right of the bankrupt to maintain such a suit may depend upon the action of the assignees after the suit is brought. It is not necessary for the bankrupt to prove that when he brought the action the assignees had already abandoned that particular asset. If the assignees, after the suit is brought, expressly assent to it the bankrupt's title is complete and he will be entitled to recover. If the assignees, after suit is brought, impliedly assent to it, the result is the same.

In the case at bar, three years having elapsed without anything done by the assignees in the way of disposing of this equitable asset, the bankrupt, in November, 1881, had such an amount of title that he could have brought a suit against the trustees under the will to obtain his share, assuming that the contingency had then happened upon which the right to a distribution depended.

By bringing such a suit he would have asserted a claim adverse to that of the assignees and, using the language of Mr. Justice SHIRAS already quoted, it would have been incumbent upon the assignees to take the steps necessary to assert their right to the property.

Mr. Sweetser having such a title it follows that the Florence Machine Company, a subsequent creditor, could make an equitable attachment which would make it incumbent upon the assignees to assert their rights in the proper manner, viz., by an intervention in the attachment suit within two years, in accordance with United States Rev. Sts. sec. 5057.

## B.
## Second Question.

The attachment made by the Florence Machine Company rendered it necessary for the assignees at their peril to intervene and contest the same within two years in accordance with United States Rev. Sts. sec. 5057.

It appears by the agreed facts (see Record, pp. 34, 35, 39) that the property in question in 1878, at the time of the bankruptcy, consisted of a future contingent equitable interest, the value of which depended largely upon the bankrupt's outliving three life beneficiaries, one of whom, Mrs. Sweetser, as a matter of fact lived until December, 1900. During the three years following the bankruptcy, *i.e.*, from March, 1878, to November, 1881, the assignees did nothing to show that they claimed this equitable interest. So far as appeared, they had abandoned the same, or were ready to do so. In August, 1888, the bankrupt obtained his discharge. In November, 1881, the Florence Machine Company, a subsequent creditor of the bankrupt, made an equitable attachment of this interest by a bill in equity against the bankrupt and the trustee holding the fund. (See Record, p. 35.)

By this attachment the Florence Machine Company asserted a claim to said equitable interest adverse to that of said assignees.

The plaintiff in error, John C. Hammond, claims title under this equitable attachment made by the Florence Machine Company, November 28, 1881. (See amended answer of John C. Hammond, Record, p. 14. See also Agreed Facts, Record, p. 35.)

He claims that the bankrupt in 1881, in spite of the bankruptcy, under the existing circumstances had an attachable interest, and that (the attachment being made,

and the assignees being informed of it) the assignees were bound to intervene within two years, and assert their title.

The said Hammond has pleaded said statute in this suit as a bar to the claims of the assignees. (See Record, pp. 17, 42.)

The language of United States Rev. Sts. sec. 5057, is as follows: —

> "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee unless brought within two years from the time when the cause of action accrued for or against such assignee."

In regard to the true meaning and effect of section 5057 of United States Revised Statutes there is some conflict of authority.

The cases —

*Bailey* v. *Glover*, 21 Wall. 342, 346, 347;
*Rock* v. *Dennett*, 155 Mass. 500;
*Pritchard* v. *Chandler*, 2 Curtis C.C. 488;
*Walker* v. *Towner*, 16 N.B.R. 285, 287;
*Avery* v. *Cleary*, 132 U.S. 604, —

hold that the statute (sec. 5057) applies to adverse claims made by third parties after the bankruptcy, and that assignees are bound to dispute such claims within two years of the time when they are asserted.

In *Rock* v. *Dennett*, 155 Mass. 500, decided in February, 1892, the facts were as follows: One Campbell be-

came bankrupt in 1876, and H. W. Bragg was appointed assignee. The tenant, Dennett, seized possession in 1880 and thereafter held adversely. In 1889 said assignee, never having been in possession of the real estate in question, made an entry and gave a deed to the demandant Rock. The purchaser, said Rock, brought his writ of entry in 1889. *Held*, that the statute (sec. 5057) began to run against the assignee when he was disseized in 1880, and that he was barred after two years. *Held*, also, that the demandant, Rock, who purchased from him, stood in his shoes and was also barred.

The question as to whether the statute applied to adverse claims made against the assets after the bankruptcy or not, was fully argued and considered, and it was decided that the statute did apply to such claims.

Mr. Justice BARKER says, —

> "It is contended that the limitation contained in U.S. Rev. Sts. § 5057, does not under such a state of facts bar the demandant's action because as it is claimed that limitation applies only to suits in respect of property to which adverse claims existed while it was in the hands of the bankrupt and before assignment, and does not apply to wrongs done to the assignee or to property of the estate after it has vested in him. . . . But the statute has a wider operation than that for which the demandant contends. As is said by MILLER, J., in *Bailey* v. *Glover*, 21 Wall. 342, 346, 347, 'it applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued

for or against the assignees. . . . Congress has said to the assignee you shall commence no suit two years after the cause of action has accrued to you.'

"The narrower view of the corresponding provisions of the Bankruptcy Act of 1841 . . . taken by Mr. Justice NELSON in *In re Conant*, 5 Blatch. 54, and followed in *Stevens* v. *Hauser*, 39 N.Y. 302, is inconsistent with the views of Mr. Justice CURTIS in *Pritchard* v. *Chandler*, 2 Curtis C.C. 488, and contrary to the plain implication of the decision of the Supreme Court of the United States in *Banks* v. *Ogden*, 2 Wall. 57, 70. The explicit and comprehensive statement of the construction of the limitations given in *Bailey* v. *Glover*, *ubi supra*, is plainly inconsistent with the contention of the demandant and with the doctrine of the cases on which he relies. It is said in *Traer* v. *Clews*, 115 U.S. 528, 538, that the case of *Bailey* v. *Glover* has never been overruled, doubted or modified by the Supreme Court of the United States. It is undoubtedly the authoritative exposition of the law and conclusive upon the point that the short statute of limitations applies to adverse claims arising after the assignment in respect to property vested in the assignee. See also the opinion of DILLON, J., in *Walker* v. *Towner*, 16 N.B.R. 285, 287, and cases cited. It follows that the statute is a bar to the demandant's action."

In 1896 this Court, in the case of *Dushane* v. *Beall*, 161 U.S. 513, without in any way referring to *Rock* v. *Dennett*, or *Bailey* v. *Glover*, or *Pritchard* v. *Chandler*, or *Walker* v. *Towner*, or *Avery* v. *Cleary*, made a dictum as follows: —

"That limitation (sec. 5057) is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee to which adverse claims existed while in the hands of the bankrupt and before assignment."

The only case cited for this which is at all in point is *In re Conant*, 5 Blatch. 54, which, as Mr. Justice BARKER pointed out, was under the act of 1841, the language of which was essentially different.

We believe that the law is as stated in *Bailey* v. *Glover* and *Rock* v. *Dennett*, and that those cases cannot be considered as overruled.

An examination of the briefs in said case of *Dushane* v. *Beall* shows that the case of *Rock* v. *Dennett* was not cited nor called to the attention of the Court.

The adverse claim in *Dushane* v. *Beall*, as in the present case, consisted of an attachment of an asset which formed a part of an estate in bankruptcy. The facts were as follows: In 1876 one Tintsman was adjudicated a bankrupt. He had a possible claim against a railroad company, but did not include it in his schedules. After his bankruptcy he became indebted to one Beall, who, in 1888, attached said claim as the property of the bankrupt. The assignee in bankruptcy appeared in 1888 to contest this attachment. The attachment proceeding was brought in the Court of Common Pleas in Pennsylvania, and that Court ruled that the assignee had lost any right to the fund by reason of delaying claim thereto for an unreasonable time, and also that the assignee was barred by section

5057. The case was then taken to the Supreme Court of Pennsylvania (149 Penn. St. 439), which ruled that the statute, sec. 5057, did not apply, but that the delay of the assignee was fatal to his claim.

The assignee in bankruptcy took the case to this Court. Chief Justice FULLER, in his opinion, says, —

> "Nor can we find . . . any evidence that the assignee knew or was informed of [the bankrupt] Tintsman's interest prior to August 10, 1888."

It is clear that the rights of the assignee were not barred by section 5057. The adverse claim of the attaching creditor was not asserted until 1888, and in the same year the assignee intervened to contest his claim. From the bankruptcy in 1876 down to 1888, the only person claiming an interest adverse to the assignee was the bankrupt himself. It is well settled that the statute, sec. 5057, does not run in favor of the bankrupt against the assignee.

If in *Dushane* v. *Beall* the assignees had delayed for sixteen years to intervene, the decision would doubtless have been different.

Here the adverse claimant is not the bankrupt, but the Florence Machine Company, a subsequent creditor which has, by means of its attachment suit, charged the asset in question with an equitable lien in its favor.

See *Snyder* v. *Smith*, 185 Mass. 58.

In the case at bar the assignees knew of the attachment suit in 1882, within one year after it was brought. Warren O. Kyle, who was appointed one of the assignees of Sweetser in December, 1882 (see Record, p. 36), was solicitor for the Florence Machine Company in the attach-

ment suit brought in November, 1881 (see Agreed Facts, Record, p. 35), and was acting as such as late as November, 1882, when he signed the replication filed November 15, 1882. (See Record, p. 26.)

It is interesting to note that Mr. Warren O. Kyle, as assignee and one of the defendants in error in this case, now claims that no rights were obtained by the suit brought by him in 1881.

The plaintiff in error claims that the assignees were bound at their peril to file an intervening petition, or an answer in the nature of such a petition, in said attachment suit within two years of the time they learned of its existence.

In *Snyder* v. *Smith*, 185 Mass. 58, it was held that an intervening petition was a proper method of testing the validity of an equitable attachment.

The same result possibly could have been attained by a bill in equity against the Florence Machine Company to enjoin it from proceeding with its attachment suit.

The assignees did not bring such a bill, nor did they within two years seek to intervene.

The statute of limitations, section 5057, began to run against the assignees in December, 1882, and in December, 1884, became a bar against them.

It is not necessary to determine whether the two years began to run against the assignees as soon as the attachment was made in November, 1881, on the ground that it was openly brought, and there was no fraudulent concealment of the same.

It certainly began to run in December, 1882, when Mr. Kyle became a co-assignee with Mr. Dowse in place of Mr. Dibble. (See Record, p. 36.) Reckoning from

either date, more than two years elapsed before the assignees intervened to contest the adverse attachment of the Florence Machine Company.

The plaintiff in error claims that, according to the weight of authority, whenever, after the bankruptcy assignment, adverse claims are properly asserted against the assets, either by attachment or adverse possession, or otherwise, the assignees are bound, under section 5057, to proceed in court against the adverse claimant within two years, to maintain their rights.

The assignees, having failed to proceed in court in the proper way against the Florence Machine Company within two years, should be held to be barred.

## C.
## Third Question.

Assuming that the assignees were not bound by section 5057 of United States Revised Statutes to intervene within two years, they nevertheless were bound to intervene at their peril within a reasonable time.

They did not intervene for over sixteen years (see Record, p. 39), when on May 20, 1899, they filed an answer setting up their title as assignees.

In *Squire* v. *Lincoln*, 137 Mass. 399, 405, FIELD, J., says, —

> "We are of opinion that if the assignee having notice of the suit does not intervene it is not open to these defendants to set up this defence; it is presumed then that the assignee assents to the plaintiffs prosecuting the suit."

In the case at bar the assignees knew of the suit, and did not intervene for over sixteen years.

The said Hammond duly raised the point that said intervention was too late. (See Hammond's Amended Answer, Record, p. 17. See Agreed Facts, Record, p. 42.)

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, 620, SHIRAS, J., says, —

> "It is for the assignee to determine whether or not in a given case he will assert his right to property. . . . This election he must exercise within a reasonable time. A failure to do so may as against third parties be construed as an election not to claim the property. . . . In January, 1883, when the attention of the assignee was directly called to the property he did not take the steps necessary to assert his right to the property. . . . Under these circumstances the assignee should now be estopped from asserting any right or title to the property against the defendant."

In the case at bar the situation from 1878 to 1882, inclusive, was as follows: At the time of the bankruptcy the bankrupt Sweetser had a vested future interest, which, for various reasons, was of doubtful present value. His assignees in bankruptcy had a right to elect whether they would abandon this asset or not. No right of action had accrued, either in favor of the bankrupt or his assignees, against the trustee under the will, as the entire income of the trust fund was payable to the life beneficiaries, and no part of the principal was payable to the bankrupt until the termination of the trust upon the decease of the last of said life beneficiaries.

No statute of limitations was, therefore, running in favor of the trustee, under the will, against either the bankrupt or his assignees. This situation continued for nearly four

years, when the Florence Machine Company made its equitable attachment. November 28, 1881. (See Record, p. 32.)

The only way the assignees could properly realize anything from the asset was by selling the same. It was not to be supposed that the assignees would think of waiting until the termination of the trust to close their estate. It is the duty of assignees to collect all claims and dispose of all assets which are of value within a reasonable time, and two years is ordinarily held to be a reasonable time.

If an assignee omits to bring suit within two years on any claims which are matured, his right of action is barred.

*Ross* v. *Wilcox*, 134 Mass. 21.

After the expiration of two years from the date of Sweetser's bankruptcy, it was reasonable for the bankrupt and his subsequent creditors to assume that the assignees had abandoned this asset. No sale had been made, and no notice had been given to the bankrupt or to the trustee under the will, that the assignees intended to do anything with the asset. The interest of Sweetser under the will appeared of record in the probate court.

There was no fraudulent concealment of the asset by the bankrupt. No examination was made of the bankrupt. He was allowed to obtain his discharge.

To use the language of Chief Justice FULLER in *Sparhawk* v. *Yerkes*, 142 U.S. 1, 14, the assignees "contented themselves with the hope that masterly inactivity might enable them to assert a claim if the asset finally proved of value."

The language of Mr. Justice SHIRAS, in *Taylor* v.

*Irwin*, 20 Fed. Rep. 615, 618, is very much in point. He says, —

> "The title to the land stood in the name of Joseph Cain [the bankrupt] upon the records of the county in which it is situated for more than four years after the assignee was appointed. It does not appear that the assignee ever examined the bankrupt touching his property, or that either the bankrupt or his wife ever made any false statement to the assignee about the property. While the assignee may not have known that the property could be subjected to the debts due creditors yet it does not appear that the bankrupt or his wife took any steps to conceal the property or deceive the assignee in regard to the same. Certainly nothing is proven affecting the good faith of the defendant (a purchaser from the bankrupt). . . . In January 1883 . . . at the request of a creditor he (the assignee) did put up for sale whatever interest he might have in the property. . . . It was then occupied by an adverse claimant and it was his duty if he wished to sell it to procure an order from court for that purpose after notice given to the adverse party. . . . Under these circumstances he would not only be barred by the statute of limitations but would also be estopped from asserting a right to the premises against a *bona fide* purchaser for value."

In November, 1881, the Florence Machine Company had a right to assume that this asset had been abandoned. The bankrupt had an equitable interest which could be attached.

The Florence Machine Company attached it. The suit, by means of which the attachment was made, was a

matter of record. The bankrupt and the trustee under the will were both made parties defendant and both were served with process. There was no occasion to join the assignees as parties.

It has never been suggested that a bankrupt bringing suit upon an abandoned chose in action should join the assignee as a party, either as a plaintiff or a defendant. The Florence Machine Company brought its suit in the usual way.

The defendant Hammond claims that the making of this equitable attachment was an assertion by the Florence Machine Company of an adverse interest touching this asset, and that the assignees were bound at their peril to defend their title either by intervening in said suit within a reasonable time (*Squire* v. *Lincoln*, 137 Mass. 399, 405; *Powers* v. *Raymond*, 137 Mass. 483) or by bringing a separate suit against the Florence Machine Company to enjoin them from proceeding with said attachment.

As suggested by Mr. Justice SHIRAS, they could not make a proper sale except after obtaining an order of court granted after notice to the Florence Machine Company.

They did not attempt to make any sale.

They did not intervene until after eighteen years had elapsed. They did not bring any suit against the Florence Machine Company to enjoin said attachment.

The case of —

*Avery* v. *Cleary*, 132 U.S. 604, —

is a strong authority for the defendant Hammond. The facts were as follows: The bankrupt Ellis, having three policies of life insurance, assigned them about a year before his bankruptcy to one Morse as trustee for his two

children. About a year after the bankruptcy (which was in 1878) the insurance company was notified of the assignment. A little later the bankrupt died, and his administrator, being also the guardian of said children, collected over $10,000 from the company. About three years later the assignee in bankruptcy learned of the matter and sued the administrator and guardian to recover the amounts collected. *Held*, that the notice to the insurance company made on behalf of the children after the bankruptcy was the assertion of a right adverse to that of the assignee, and that the statute (sec. 5057) began to run from that date against the assignee in favor of the children, and the trustee and administrator and guardian who acted for them. *Held*, also, that the failure of the bankrupt to include the policies in his schedules and to inform the assignee of their existence did not amount to a fraudulent concealment of the policies so as to prevent the statute running even though the assignee was ignorant of the cause of action against said children and those acting for them. *Held*, also, that the suit by the assignee against the person acting for the children was a suit between an assignee and a person claiming an adverse interest within the meaning of section 5057, and was barred by the statute.

The following language of Mr. Justice HARLAN is pertinent: —

> "the mere fact that he [the bankrupt] omitted any mention of the policies in his schedules in bankruptcy and that neither he nor his administrator gave information of them to the assignee would not establish fraud within the meaning of the rule announced in *Bailey* v. *Glover*.
>
> "The omission from the schedules of any reference to the policies and the failure to call the attention of

the assignee to them may have been caused by an honest belief upon the part of Ellis that they belonged to his children. . . . Be this as it may the bankrupt's children are to be regarded as asserting an interest in the policies at least from March 1, 1879. . . . Fraud is not imputable to them nor to the guardian simply because neither they nor he informed the assignee in bankruptcy of their claims. Their silence when they were not under any legal obligation to speak, and when they were unaware of any claim being asserted by the assignee did not amount to concealment. They did nothing to prevent him from obtaining full information in reference to the assets of the bankrupt. . . . It is fundamental in the rule announced in *Bailey* v. *Glover* that there must not be negligence or laches upon the part of the assignee in bankruptcy in coming to the knowledge of the fraud which is the foundation of his suit and which is relied upon to defeat the limitation of two years. A rigid enforcement of that condition is essential to meet the object of the statute of limitation. That object was to secure a prompt determination of all questions arising in bankruptcy proceedings and a speedy distribution of the assets of bankrupts among their creditors . . . the assignee did not show such diligence as entitles him to exemption from the limitation of two years prescribed by the statute."

*Cleary* v. *Ellis Foundry Co.*, 132 U.S. 612, —

is to the same effect.

Apart from any statute of limitations, a court of equity will hold failure to act for seventeen years laches.

In *Taylor* v. *Irwin*, 20 Fed. Rep. 615, the assignee, after six years, was held to be barred not only by the statute, but also by laches.

A delay of six or seven years is often held laches.

No authorities need be cited for the proposition that a delay of seventeen years will amount to laches.

## D.
## Reply to Defendants' Claim.

The assignees Dowse and Kyle, defendants in error, will doubtless claim that their rights were preserved by the suit of *Dibble* v. *Sweetser*, brought by Mr. Dowse in his own name and that of Mr. Dibble in the United States District Court, September 19, 1882, against the bankrupt Sweetser and the trustee Solon O. Richardson. (See Record, p. 36.)

It is a complete answer to this to say that the Florence Machine Company was not made a party to this suit, and, so far as appears, never heard of it until twenty years later.

Still further, the assignees Dowse and Kyle have not, in their answer filed in this case, claimed any rights by reason of the said suit of *Dibble* v. *Sweetser*. As the case was reserved for the consideration of the full court upon the pleadings as well as the agreed facts, it was not, and is not, open to the said assignees to base any rights upon the fact that such a suit was brought.

Mr. Hammond claims that this suit was entirely inoperative against the Florence Machine Company. Said company was not joined as a party, and it does not appear that it ever knew of the suit. No cause of action had accrued in favor of the assignees as against Solon O.

Richardson, trustee, and the only apparent reason for bringing the suit was that the assignees, or rather Mr. Dowse, felt that the title of the assignees to said asset was uncertain. The bill prayed that the said Sweetser might be ordered to assign his interest to the assignees, and that the trustee might be enjoined from paying the trust fund to the said Sweetser or any one claiming under him. It did not pray that the bankrupt might be enjoined from making any transfer and did not refer in any way to the attachment suit of the Florence Machine Company.

It does not appear that Mr. Dibble knew of the suit, or authorized the use of his name. The fact that he had already filed his resignation as assignee would indicate, perhaps, that he did not consent to the use of his name.

Assuming that the suit was properly authorized by Mr. Dibble, and that it was properly brought in his name after his resignation (which is not conceded), the only possible ground upon which the suit could be maintained was the obtaining of a decree enjoining the bankrupt from selling or transferring his interest. The assignee Dowse evidently felt that the conduct of the assignees had been such that the bankrupt might consider that they had abandoned this asset, and considered that there was danger of his attempting to dispose of it.

It does not appear that Mr. Kyle, who became one of the assignees in December, 1882, after this suit of *Dibble* v. *Sweetser* was brought, ever knew of it until long afterwards. He did not become a party to the suit for many years.

The defendants in error will also rely upon the fact that the assignees did not have actual knowledge of this asset until after the adverse interest was asserted.

The same thing was true in —

*Lancey* v. *Foss*, 88 Me. 215.
*Taylor* v. *Irwin*, 20 Fed. Rep. 615.
*Avery* v. *Cleary*, 132 U.S. 604.
*Herring* v. *Downing*, 146 Mass. 14.

In these cases the Court place great stress upon the point that the ignorance of the assignees was due to their failure to inquire.

No fraudulent concealment of the asset by the bankrupt is shown.

If the bankrupt had been examined, or the records of the probate court searched, the assignees would have learned of this equitable interest prior to 1881. When they did learn of it in 1882, and when they knew that the Florence Machine Company was seeking by its attachment to reach and apply it, they omitted to intervene, and, so far as appears never informed the Florence Machine Company that its adverse claim would be resisted.

See also, on the question of laches and estoppel, —

*Hallett* v. *Fowler*, 10 Allen, 36.
*Fleming* v. *Courtenay*, 98 Me. 401, 410.
*Nash* v. *Simpson*, 78 Me. 142, 152.
*Amory* v. *Lawrence*, 3 Clifford, 523, 535.
*Sessions* v. *Romadka*, 145 U.S. 29, 39.

## E.
## Fourth Question.

The Florence Machine Company in November, 1881, was not barred by United States Rev. Sts. sec. 5057, from bringing its attachment suit.

The suit was not brought against the assignees. It was brought against the bankrupt and the trustee under the will of Solon O. Richardson. The plaintiff proceeded

upon the theory that the bankrupt had such title to the asset in question that the plaintiff could make an equitable attachment.

Section 5057 applies only as regards suits or proceedings in court brought by or against assignees in bankruptcy.

In —

*Rock* v. *Dennett*, 155 Mass. 500, —

a claim adverse to that of the assignee was asserted by Mr. Dennett by a seizure of property which formed a part of the estate in bankruptcy.

In —

*Avery* v. *Cleary*, 132 U.S. 604, —

a claim adverse to that of the assignees was asserted by the children of the bankrupt by a notice to the insurance company that they claimed under an assignment from the bankrupt.

In the case at bar, the adverse claim was asserted by the Florence Machine Company by means of an attachment suit which, in a way, amounted to a seizure of the property.

The assignees have not pleaded the statute (sec. 5057) as a bar to the attachment suit, and for this reason, also, it was error for the Court to find that the Florence Machine Company was barred by that statute.

## F.

## Motion to Dismiss.

The points raised by the defendants in error in their motion to dismiss have been discussed in the brief filed by the plaintiff in error October 20, 1906. He begs leave

to refer to that brief for a consideration of the questions there raised.

In —

*Dushane* v. *Beall*, 161 U.S. 513, —

the point was raised that no federal question was involved, but the objection was summarily disposed of.

## C.

## Conclusion.

The plaintiff in error is constrained by considerations of expense to forego an oral argument of the questions involved in this case.

He respectfully submits that the questions raised are interesting and important, and worthy of the careful consideration of the Court.

HOLLIS R. BAILEY,
for JOHN C. HAMMOND,
Plaintiff in Error.

IN THE

# Supreme Court of the United States

Office Supreme Court U. S.
FILED
SEP 25 1906
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM 1906.

No 164.

JOHN C. HAMMOND, PLAINTIFF IN ERROR.

*vs.*

WILLIAM W. WHITTREDGE, TRUSTEE UNDER THE WILL OF SOLON O. RICHARDSON, DECEASED, ET AL, DEFENDANTS IN ERROR.

## Motion to Dismiss or to Affirm.

AND

## Brief in Support of Said Motion.

WARREN OZRO KYLE,
FRED JOY,
*Counsel for Defendants in Error for the Purposes of said Motion.*

BOSTON:
SPATULA PUBLISHING CO., SUDBURY BLDG.
1906.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1906.

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JOHN C. HAMMOND, PLAINTIFF IN ERROR.

*vs.*

WILLIAM W. WHITTREDGE, TRUSTEE UNDER THE WILL OF SOLON O. RICHARDSON, DECEASED, ET AL.

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### *MOTION TO DISMISS OR TO AFFIRM.*

And now come William B. H. Dowse and Warren Ozro Kyle, assignees in bankruptcy of Elbridge L. Sweetser under the bankrupt act of 1867, defendants in error, and move the court to dismiss the writ of error in this case for want of jurisdiction, because the decree of the Supreme Judicial Court of Massachusetts to which said writ of error was directed, although it is the decree of the highest court of a state in which a decision could be had, is not against any title, right, privilege or immunity specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

And the said defendants in error also move the court to affirm said decree, because, although the record in said cause may show that this court has jurisdiction, yet it is manifest that said writ of error was sued out for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

WARREN OZRO KYLE,
FRED JOY,

*Counsel for said Assignees, Defendants in Error for the Purposes of this Motion.*

To Hollis R. Bailey, Esq., Counsel for the above-named Plaintiff in Error.

Please take notice that on Monday, on the day of A. D. 1906, at the opening of the court or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

WARREN OZRO KYLE,

FRED JOY,

*Counsel for the said Defendants in Error for the Purposes of these Motions.*

## BRIEF.

This is a petition for instructions brought in the Supreme Judicial Court of Massachusetts by William W. Whittredge, one of the defendants in error, as the present trustee of certain property held in trust under item 8 of the will of Solon O. Richardson, to find out who was entitled now to receive Elbridge L. Sweetser's half of the fund. This half was claimed by the assignees in bankruptcy of Elbridge L. Sweetser, under a petition filed in 1878, defendants in error here, making the present motions; and also by the plaintiff in error claiming under an alleged equitable attachment in a pending suit begun in November, 1881, and under an assignment made in October, 1885, by the bankrupt to secure two debts incurred after this bankruptcy.

The plaintiff in error admitted that on the death of the testator Elbridge L. Sweetser took an assignable interest which would pass to his assignees in bankruptcy in 1878, bnt the contentions were that the assignees had abandoned this property, had been guilty of laches in asserting any claim thereto, and were barred by U. S. Rev. Stats., § 5057, which provides that "No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

By the death of the life beneficiaries the fund was ripe for distribution December 15, 1900, and on February 1, 1901, this petition was brought.

The Supreme Judicial Court of Massachusetts decided:—

I. That the interest in controversy was assignable (as admitted by the plaintiff in error).

II. That the title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder (also admitted by the plaintiff in error, except as to the applicalion by the court of the principles of general and local law relating to assignment of choses in action).

III. That the assignees in bankruptcy had not abandoned the property;—a finding of the court on the facts, not here to be examined or controverted.

IV. That the assignees had not been guilty af laches;—also a finding of the court on the facts, not here to be examined oi controverted.

V. That the contention of the plaintiff in error that one in possession of property is barred from exercising the rights that ownership confers on the owner by not having brought an action is

groundless; — which, we submit, is also a decision of the court on a question of general law which will not here be examined, and which is, indeed, axiomatic.

Having decided the questions of fact and local law, which might have been a possible basis for a federal question, in favor of the assignees in bankruptcy, and against the plaintiff in error, there remained in the case no question as to any title, right, privilege or immunity under a statute of the United States; and the court expressly declined to choose "between the opinion in *Dushane vs Beall*, 161 U. S. 513, and the decision in *Rock vs. Dennett*, 155 Mass. 500." (See opinion of the court Transcript of Record, page 63, 189 Mass. 45–47.)

It has been expressly decided by this court that its jurisdiction in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question.

Telluride Power Co. *vs.* Rio Grande, etc., Ry. Co., 175 U.S. 647.

The rule in cases of this kind was pronounced in *Eustis vs. Bolles*, 150 U. S. 361, as follows: "It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock vs. Memphis*, 20 Wall. 590; *Cook Co. vs. Calumet & Chicago Canal Co.*, 138 U. S. 635.

"It is likewise settled law that, where the record discloses that if a question had been raised or decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

See, also, Harrison *vs.* Morton, 171 U. S. 38.

The plaintiff in error, John C. Hammond, in his motion to be admitted a party respondent in this suit in the Supreme Judicial Court of Massachusetts, stated that he "claims to be entitled to the trnst fund in controversy, *subject to the rights of the assignees in bankruptcy of said Sweetser;*" (see motion of John C. Hammond to be admitted as a party in the suit, Transcript of Record, psge 8), and nowhere in the record does there appear any "title, right, privilege or immunity specially set up or claimed" except in the twentieth paragraph of his amended answer, Transcript of Record, page 17.

The Amended Answer (see page 17 Transcript of Record) does not specially set up or claim any personal right, or personal right of property, under any Act of Congress; but merely pleads a statute of limitations in defence of a title which, as the state court found upon other and distinct grounds, was of no validity. The state court having decided, on grounds involving no Federal question specially raised, that the plaintiff in error never acquired title, it became a purely academic question whether or not he might have successfully pleaded the statute of limitations referred to if the questions of fact had been decided otherwise. He had no right, he had acquired no interest which the law could recognize or protect, and, therefore, he cannot bring here by writ of error any question as to the only statute referred to in the pleadings.

By the terms of the reservation (see Transcript of Record, page 56) the plaintiff in error was limited, even in the State Court, to the questions raised by his answer; (Commonwealth vs. Worcester & Nashua R. R. Co. 124 Mass. 561.) and by the judiciary act the jurisdiction of this Court in cases of this kind is limited to such questions as were specially raised in the pleadings. Revised Statntes of the United States, § 709.

The only rights, titles and immunities arising under the sections of the United States Revised Statutes referred to in the assignment of errors are the rights, titles and immunities of assignees in bankruptcy, and as the decision is in all respects in favor of and not against the rights of the assignees under said statutes this court will not review the decision of the Supreme Judicial Court of Massachusetts.

De Lamar's Mining Co. *vs.* Nesbitt, 177 U. S. 523.

Missouri *vs* Andriano, 138 U, S. 496, and cases cited in the opinion of the court.

The Federal question must be considered as not decided when a question of state law intervenes and is decisive of the case. To give jurisdiction, the Federal question must be necessary to the judgment or decree complained of.

Detroit R. R. *vs.* Guithard, 114 U. S. 133.
Choteau *vs.* Gibson, 111 U. S. 200.
Citizens' Bank *vs.* Board of Liquidation, 98 U. S. 140.
McManus *vs.* O'Sullivan, 91 U, S. 578.
Murdock *vs.* Memphis, 20 Wall 590.
Adams *vs.* Burlington R. R., 117 U. S. 127.
Chapman *vs.* Goodwin, 123 U. S. 548.
Brooks *vs.* Missouri, 124 U. S. 394.
Water Works, *vs.* Sugar Co, 125 U. S. 29.
De Sausure *vs.* Gaillard, 127 U. S. 216.
Israel *vs.* Arthur, 152 U. S. 355.

Wailes *vs.* Smith, 157 U. S 276.
San Francisco *vs.* Itsell, 133 U. S. 567.
Hale *vs.* Ackers, 132 U. S. 554.
Cokran Oil & D. Co., Arnaudet, 199 U. S. 182.
Beals *vs.* Cone, 188, U. S. 184.

The mere averment of the existence of a Federal question is not sufficient to give this court jurisdiction; a real and not a fictitious Federal question is essential to give this court jurisdiction over the judgment of State courts, and when it appears that the alleged Federal question upon which jurisdiction is invoked is wholly without foundation the writ of error will be dismissed.

Sawyer *vs.* Piper, 189 U. S. 154, 156, 157.

The asserted Federal element is too remote and frivolous.

Blythe *vs.* Hinckley, 180 U. S. 333.
Equitable Life Insurance Soc. *vs.* Brown, 187 U. S. 308.

The final decree in this case which this court is asked to reëxamine was entered October 31, 1905. (See Transcript of Record, pages 57 and 58.) From that decree any one of the numerous parties, including the plaintiff in error, considering himself aggrieved, might have appealed at any time within thirty days. Mass. R.L. c. 159 § § 17, 18, 19, and 34. "As such, it was when rendered, open to review by the Supreme Court upon a new appeal, and for that reason was not the final judgment of the highest court of the state in which a decision in the suit could be had." (Mr. Justice Gray, delivering the opinion of the Court in Great Western Telegraph Co. *vs.* Burnham 162 U. S. 339.) Hence it appears that said decree at the time this writ of error was sued out, November 15, 1905, (see Transcript of Record pages 1 and 2) was not a final decree "in the highest court of a state, in which a decision in the suit could be had," and, therefore, this court has no jurisdiction.

U. S. Rev. Stat. section 709.
Great Western Telegraph Co. *vs.* Burnham 162 U. S. 339.
Fisher *vs.* Perkins 122 U. S. 522.

Respectfully submitted,

WARREN OZRO KYLE,
FRED JOY,

*Counsel for Assignees in bankruptcy, Defendants in Error, for the purposes of these motions.*

IN THE

# SUPREME COURT OF THE UNITED STATE

Office Supreme Court, U
FILED.
JAN 9 1907
JAMES H. McKENN
CL

OCTOBER TERM, 190[illegible].

No. 164.

JOHN C. HAMMOND, PLAINTIFF IN ERROR

*vs.*

WILLIAM W. WHITTREDGE, TRUSTEE UNDER TH
WILL OF SOLON O. RICHARDSON, DECEASED,
*ET AL.*, DEFENDANTS IN ERROR.

## Supplemental Brief in Behalf of W. B. H. Dowse, et al., Assignees in Bankruptcy, Defendants in Error.

WARREN OZRO KYLE,
FRED JOY,
*of Counsel for Defendants in Error*
*W. B. H. Dowse, et al.,*
*Assignees in Bankruptcy*

BOSTON:
SPATULA PUBLISHING CO., SUDBURY BLDG.
1906.

# SUPREME COURT OF THE UNITED STATES.

NO. 164. OCTOBER TERM, 1906.

JOHN C. HAMMOND, PLAINTIFF IN ERROR,

*vs.*

WILLIAM W. WHITTREDGE, TRUSTEE UNDER THE WILL OF SOLON O. RICHARDSON, DECEASED, *ET AL.*, DEFENDANTS IN ERROR.

## SUPPLEMENTAL BRIEF IN BEHALF OF ASSIGNEES IN BANKRUPTCY, W. B. H. DOWSE, *ET AL.*, DEFENDANTS IN ERROR.

If the court should find it necessary to consider the merits of the case it is believed that a correct understanding of the facts will be conclusive in favor of these defendants in error and will demonstrate the correctness of the decision of the Supreme Judicial Court of Massachusetts.

### STATEMENT OF THE CASE.

This is a petition for instructions filed February 1, 1901, by the trustee under the will of Solon Osmond Richardson, late of Wakefield, deceased. The testator made his will September 9, 1869, and died August 31, 1873. The will was duly admitted to probate, and there was found a sufficient amount of property to satisfy the provisions of item eight, to which this petition relates. The material portions of the will are as follows:—

"Item Eight.—I hereby give and bequeath to my executors, in trust, the sum of thirty-five thousand dollars to be invested as before herein advised, the income from which I direct to be divided and shared equally between my three following

named sisters, viz: Mary A. Sweetser, Martha Hutchinson and Louisa Richardson." . . . "At the decease of all my three said sisters I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever."

The three sisters mentioned as beneficiaries all survived the testator, but have now all deceased, the last survivor being Mary A. Sweetser, who died December 15, 1900. Martha Hutchinson had as her only child a daughter, Martha A., born before the death of the testator, and now the wife of the petitioner, William W. Whittredge, trustee. Louisa Richardson never had any children. Mary A. Sweetser had as her only child a son, Elbridge L. Sweetser, who was born before the death of the testator, is now living, and one of the respondents in this case. There is no question that Martha A. Hutchinson, now Mrs. Whittredge, is entitled to one-half of the fund; and it is equally clear that the respondent, Elbridge L. Sweetser, would be entitled to the other half, if his interest in the fund had not passed to his assignees in bankruptcy under the law of 1867, who are now entitled thereto. Sweetser's adjudication in bankruptcy in the proceedings under which the assignees claim title was on February 23, 1878. There is no assignment or lien of Sweetser's interest of earlier date. The bankrupt did not mention his interest under the Solon O. Richardson will in his bankruptcy schedule, and his assignees in bankruptcy had no knowledge that any such interest existed until September, 1882.

The respondent Sweetser has always claimed that under said will of his uncle he took no interest either present or potential that could pass by assignment, but rather a mere possibility or expectancy that would become property only on the death of the last survivor of the three sisters. He has made some mortgage assignments or deeds (Exhibits 3, 4 and 5, Record, pages 47 to 52, and answer of Atkins, page 33 of the Record) of all his right, title and interest in the trust property which he then had (October, 1885, and March, 1886,

long after the first bankruptcy, February, 1878) or to which he might at any time be entitled; but these mortgages or deeds were never recorded, no notice of them was given to his assignees in bankruptcy, and there has been nothing to indicate any change in the position he held at the time of filing his original petition in bankruptcy, and which he intends to set up by his answer in this case namely, that he never had any interest to pass to anybody until the death of his mother. The assignees in bankruptcy never had any knowledge of any of the bankrupt's assignments, deeds or mortgages, which were all subsequent to the bankruptcy proceedings under which they claim title, until pleaded in this suit.

As soon as Sweetser's assignees in bankruptcy heard of his interest under the Richardson will, they promptly notified the trustee of this fund that they claimed it, and, in order to make such notice a matter of record, summoned the trustee to answer in the United States District Court to a bill in equity, a copy of which is found on pages 10, 11 and 12 of the Record.

The Florence Machine Co., a creditor of E. L. Sweetser, to whose interest John C. Hammond, the plaintiff in error, through mesne conveyances has succeeded, and W. P. Harding, a creditor of Hannah Sweetser (wife of E. L. Sweetser), have brought bills in equity, since the bankruptcy of 1878, seeking to reach and apply any interest of their respective debtors in this fund to the payment of their claims. By a second bankruptcy, November 26, 1900, Sweetser again surrendered all his property to his creditors, and, on the death of his mother, December 15, 1900, claimed that then, for the first time, an interest in the fund had become his property, and had vested in himself, free from any claims of creditors or assignees whatsoever. The respondent, E. L. Sweetser, is the only one holding this view.

There is now no dispute as to the interest under the will of Solon O. Richardson, which is the subject of the controversy, and it is agreed that said interest was of such nature as would pass by assignment in February, 1878, when Elbridge L. Sweetser, who then owned it, was adjudicated a bankrupt. "The

interest of Elbridge L. Sweetser under the said will of Solon O. Richardson was not mentioned or referred to in his schedule in bankruptcy." (See Agreed facts, Record, page 35.) Not only did the bankrupt fail to disclose this property in his schedules of property, but his assignees in bankruptcy had no knowledge of said interest until 1882, when they immediately asserted their title thereto and within a few days, September 19, 1882, began a suit in Equity in the District Court of the United States against the bankrupt and the Trustee under the Richardson will. In this suit the plaintiff in error appeared as defendant, July 1, 1901. (See Agreed Facts, Record, pages 10, 36 and 40.) This is the suit referred to in the closing paragraphs of the opinion of the Supreme Judicial Court of Massachusetts. (See opinion by Loring, J., Record, page 63.) The Florence Machine Co., a creditor in the bankruptcy proceedings, had obtained earlier information about said interest under the will of Solon O. Richardson, and had brought its bill in Equity in November, 1881, to reach and apply it in payment of notes given after the bankruptcy. Said bill in Equity was brought under General Statutes of Massachusetts, c. 113 § 2, which reads as follows: "The court may hear and determine in Equity all cases hereafter mentioned, when the parties have not a plain, adequate and complete remedy at the common law: that is to say;—(clause 11)—Bills by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within this state, which cannot be come at to be attached or taken on execution in a suit at law against such debtor." This suit is important as the plaintiff in error bases his right to prevail here on this suit and his alleged rights supposed to arise therefrom. The parties to the suit last named were the Florence Machine Co., plaintiff, and Elbridge L. Sweetser, the bankrupt, and Solon O. Richardson, trustee, son of the deceased, defendants. The defendant, Solon O. Richardson, in his answer, at once raised the point that the interest referred to in the bill, if it had ever vested in Sweetser, had passed to his assignee in bankruptcy; (Record, page 25) and the assignees in their suit in Equity above referred to (Record, page 10) made the same claim, and

asserted their title to said property, which, already within the jurisdiction of the bankruptcy court by virtue of the proceedings in bankruptcy in the case of Elbridge L. Sweetser, was again by their said suit brought within the custody and control of the United States District Court for the District of Massachusetts. Shortly thereafter, the attorney for the Florence Machine Co., was made one of Sweetser's assignees in bankruptcy, and has continued in that capacity to the present time and is one of the defendants in error in this case. It does not appear when said assignee in bankruptcy ceased to be attorney for the Florence Machine Co., in its long pending Equity suit under which the plaintiff in error now claims; but the record shows (page 27) that on August 14, 1894, both assignees in bankruptcy became parties defendant in said suit, being then for the first time cited to appear, although the plaintiff, the Florence Machine Co., had been fully advised of the title of the assignees both by said answer of Richardson, trustee, and through the knowledge of its attorney in the suit, who had also been assignee in bankruptcy since December, 1882. It should, perhaps, be noted that the Florence Machine Co., was dissolved by Act of the Legislature on April 19, 1893, and on October 1, 1894, assigned all its choses in action of every description (see Agreed Facts, Record, page 38). In this suit of the Florence Machine Co., begun in 1881, as above stated, by which the plaintiff in error now attempts to overturn the title of the assignees in bankruptcy, no claim was ever made that said assignees had forfeited their rights until December 11, 1904, when John C. Hammond, the plaintiff in error, filed a motion in said equity suit, (see Agreed Facts, last paragraph Record, page 42), and this was nearly four years after Whittredge, trustee, had filed his petition for instructions, which is the case in which this writ of error is brought, and nearly four years after the assignees had filed their answer to said petition. (Record, page 5.) The said assignees had filed their answer in said Equity suit (Record, page 29) in 1899, May 20, (Record, page 39) more than five years before Hammond had filed his motion above referred to, asking leave to file a special replication to said answer setting up for the

first time the statute of limitations, U. S. Rev. Stat. 5057, as a bar to the claim made by said assignees in said answer; it should be noted that said motion, so far as appears, has never been brought to the attention of the court, and said special replication has never become a part of the record of said suit. It should also be noted that until the plaintiff in error became a party to this long continued litigation, it had been conducted in a most friendly spirit, neither party claiming any advantage except as might come from an authortative interpretation of the will of Solon O. Richardson. If Sweetser's interest was adjudged to have passed to the assignees in bankruptcy, the Florence Machine Co., having proved a large claim in said bankruptcy, would be benefited, while if the courts should decide otherwise, its bill in Equity might prove of value to reach and apply Sweetser's interest, if any. The corporation's attorney in the Equity suit was also one of the assignees in bankruptcy, and there never was any claim of forfeiture of anybody's rights, either by abandonment, laches or by statute of limitations.

## BRIEF OF ARGUMENT.

The plaintiff in error colors every incident by his willful misconstruction of a peaceful and harmonious situation to suit his warlike fancy and the exigencies of his case. He was in the beginning neither active nor aggressive. He first acquired through mesne assignments, the control of the Equity suit in 1896, fifteen years after it was begun, and then waited two and one-half years more before filing his motion to prosecute said suit (Record, page 28); he then took no further action until five more years had elapsed when he filed the motion above referred to which was never allowed, or, indeed, brought to the attention of the court. (Agreed Facts, last paragraph, Record, page 42.) No further or other action was ever taken by the plaintiff in error in this suit, and it is to be noted that in this Equity suit, so lately discovered to be of vital importance, no injunction was granted, no hearing was ever had, and no order or decree of any kind has ever been made.

When the present suit was brought by the trustee under the will asking the instructions of the Supreme Judicial Court of Massachusetts as to what the trustee should do with the Sweetser half of the fund, all the life beneficiaries having deceased, the present plaintiff in error appeared therein, by his present counsel, and asked to be made a party and filed his answer. (See "Motion of John C. Hammond to be admitted as Party in the Suit," and "Answer of John C. Hammond," Record, pages 8 and 9.)

We desire to call the attention of the court to this motion and answer. In the former he prays to be admitted as a party, "and claims to be entitled to the trust fund in controversy, subject to the rights of the assignees in bankruptcy of said Sweetser" (Record, page 8); and in the answer he claims only so much of the fund as may be sufficient to pay a certain claim amounting to $1,809.00 and interest secured by a mortgage of the fund made by the bankrupt in October, 1885 (Record, pages 8 and 9). Of this mortgage his assignees in bankruptcy had no knowledge until it was pleaded in this case by the plaintiff in error. Not a word appears in either motion or answer about the Equity suit of the Florence Machine Co., and the so-called equitable attachment. Hammond did not change his answer until nearly four years had elapsed. On November 21, 1904, Hammond amended his answer to read as on pages 14, 15, 16 and 17 of the Record, setting forth his claims and the assignments by which he had acquired title thereto, and then for the first time referring to the suit of the Florence Machine Co. as an equitable attachment, and assuming that said suit had ripened with age so that whereas in the beginning it could only reach and apply, by virtue of a statute, property of the defendant debtor which he then had when the suit began, nevertheless it now covered and appropriated property which the debtor did not then have, property which had passed from him by operation of the bankrupt law, though concealed and not mentioned in his schedules, property which his assignees in bankruptcy had claimed as soon as they had discovered it, and had seized and appropriated so far as the same could be taken in possession before

rights of any innocent third party without notice had intervened. Alleged rights under this suit and as assignee of a mortgage by the bankrupt of this concealed property are the basis of the claims of the plaintiff in error to be heard in this court. These alleged rights rest not upon any law of the United States, but upon a claim of defect in the title of the assignees. If the assignees in bankruptcy did not abandon this property, but, on the contrary, claimed it as soon as discovered to be held in trust for the creditors of Sweetser, who proved their claims, it is clear that the decision of the Supreme Judicial Court of Massachusetts must be affirmed. The decree in this case is explicit on this point in the fourth paragraph, viz: "The said assignees in bankruptcy did not abandon said property, and have not been guilty of laches in relation thereto." (See Final Decree, Record, page 58.) In view of the immediate action of the assignees in asserting their title to this property as soon as discovered no other conclusion was possible, and this point is decisive of the whole case. It is too absurd to admit of argument that by omitting property from his schedules and concealing it from his assignees for more than two years a bankrupt or his assigns after bankruptcy can set up title thereto and bar his assignees in bankruptcy by the two years statute of limitations, when said property is claimed by them for the benefit of the creditors in bankruptcy as soon as discovered. There is nothing in this record to show any lack of diligence on the part of Sweetser's assignees in bankruptcy. That the Florence Machine Co. had knowledge of this interest in remainder under the Richardson will some months before it was disclosed to the assignees in bankruptcy is suggestive of nothing except a conspiracy between the bankrupt and one of his largest creditors to sequester this property for their mutual benefit. The failure to schedule the property and concealment of it from the assignees in bankruptcy for several years was clearly in fraud of the bankrupt law, and can hardly be claimed to constitute such an immunity as to deserve protection under the judiciary act or any other law of the United States.

Moreover the so-called equitable attachment by the Equity

suit begun before the existence of this property was disclosed to the assignees in bankruptcy, is not an attachment in any sense of the word.

"It has repeatedly been held that a plaintiff bringing a bill in Equity under the provisions of the Public Statutes, c. 151 §2 cl. 11, and the statute of 1884, c. 285 §1, to reach property of the debtor which cannot be come at to be attached or taken on execution in a suit at law against such debtor, does not thereby acquire a lien on the property which will prevent it passing to an assignee in insolvency.

*Trow* vs. *Lovett*, 122 Mass. 571.
*Squire* vs. *Lincoln*, 137 Mass. 399.
*Powers* vs. *Raymond*, 137 Mass. 483.

"Such a proceeding, even if followed by an injunction against any disposition of the property of the debtor, does not constitute an attachment, within the meaning of the Public Statutes, c. 157, §§46, 47, and does not defeat the right of the assignee to have everything that belongs to the debtor which can lawfully be taken at law or in equity and applied to the payment of his debts."

Knowlton, J., In Opinion of the Court.
*Fish* vs. *Fiske*, 154 Mass. 302, 304.

We submit that if such a proceeding cannot defeat the rights of assignees to have everything that belongs to the debtor in case of subsequent insolvency, *a fortiori*, it cannot be held to constitute a bar to assignees in bankruptcy, who are promptly seeking to apply the property of the bankrupt, as soon as discovered, to the payment of his debts.

This Equity suit with no injunction, no order, no decree, not even a hearing in twenty odd years, amounts to nothing but a mere *lis pendens*, and has no effect upon the title of the assignees in bankruptcy, the defendants in error.

As to the statute of limitations U. S. Revised Statutes, §5057, under which the plaintiff in error claims immunity, we have already in our brief on the motion to dismiss called attention to the findings of the Supreme Judicial Court deciding on

grounds of local law, involving no federal question, that the plaintiff in error had never acquired any title in defence of which he could plead such a statute; and the state court did not find it necessary to construe said statute; but, we submit, the section referred to (§5057 U. S. Rev. Stat.) does not apply to a case like the present for other reasons.

This section provides as follows: "No suit, either at law or in Equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action, barred at the time when an assignee is appointed." The latest decision of this court construing this statute is *Dushane* v. *Beall*, decided March 16, 1896, (161 U. S. 513), in which Chief Justice Fuller, delivering the opinion of the court says: "That limitation is applicable only to suits growing out of disputes in respect of property and rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment."

*Dushane* vs. *Beall*, 161 U. S. 513
*Bowen* vs. *Del., L. & W. R. R.*, 153 N. Y. 476.

This court also said, in 1879, construing the same statute, that it relates to suits by or against the assignee with respect to parties other than the bankrupt; and, we submit, it cannot apply as against the assignees to establish a title either in the bankrupt himself, or in others, when derived from the bankrupt since his adjudication, to property which passed to the assignees by operation of the bankrupt law, unless such property has been abandoned by the assignees in bankruptcy.

*Phelps* vs. *McDonald*, 99 U. S. 298, 306.
*Clark* vs. *Clark*, 17 How. 315.
*Thomas* vs. *Blythe*, 8 U. S. App. 414.

This is not a suit "between an assignee in bankruptcy and a person claiming an adverse interest." The petitioner, who is the trustee under the will, claims no adverse interest and does not plead the statute.

*Nash* vs. *Nash*, 12 Allen, 345.
*Minot* vs. *Tappan*, 127 Mass. 333, 338.
*In re* A. H. English, 6 Fed. Rep. 276.

Moreover, all statutes of limitation begin to run from the time the cause of action accrues, and, in this case, could not run until the right to the possession of the Sweetser half of the fund fell to the assignees, on the death of the bankrupt's mother, the last survivor of the testator's three sisters.

Perry on Trusts, §860.
*French* vs. *Merrill* 132 Mass. 525, 527, and cases there cited.

As it was necessary to await the termination of the life interests before any one claiming through the remainder man could claim possession of the fund, the assignees in bankruptcy have not been remiss, and the delay, if any, has not operated to the prejudice of anybody, hence there has been no laches.

*Haven* vs. *Haven*, 181 Mass. 573, 579.
*Tucker* vs. *Fisk*, 154 Mass. 574, 579, and cases cited.
*Ryder* vs. *Loomis*, 161 Mass. 161, 163.
*Beale* vs. *Chase*, 31 Mich. 532.
*New York Bank Note Co.* vs. *Hamilton Co.*, 28 N. Y. App. Div. 411.
*Ulman* vs. *Clark*, 75 Fed. Rep. 868.

In conclusion we say, as in the beginning of this section of our brief, that a correct understanding of the facts can lead only to affirmance of the decision of the Supreme Judicial Court of Massachusetts. The Record is confusing as it is encumbered with answers of claimants who have failed to press their claims, and numerous papers that have no bearing

on the only points raised in the assignment of errors; but it plainly appears that the assignees in bankruptcy, defendants in error here, did not abandon this property, that the delays have been inevitable, that no interests have suffered thereby, and that now the fund should be paid over to these defendants in error, the assignees in bankruptcy, as quickly as possible, for distribution in the bankruptcy proceedings of Elbridge L. Sweetser, begun in 1878 in the United States District Court for the District of Massachusetts.

WARREN OZRO KYLE,
FRED JOY,

*Of Counsel for Assignees in Bankruptcy, Defendants in Error.*

# Supreme Court of the United States.

No. 164.—October Term, 1906.

John C. Hammond, Plaintiff in Error, vs. William W. Whittredge, Trustee under the will of Solon O. Richardson, deceased, et al. } In error to the Supreme Judicial Court of the State of Massachusetts.

[February 25, 1907.]

The defendant in error Whittredge, who was trustee of certain property held in trust under the will of Solon O. Richardson, who died in 1873, filed this bill for instructions in the Supreme Judicial Court of the State of Massachusetts.

There was bequeathed by said will $35,000, on the following trusts:

"The income to be paid to his three sisters for life, namely, Mary A. Sweetser, Martha Hutchinson and Louisa Richardson; and 'at the decease of my said sisters, or either of them, my will is that the share belonging to the deceased sister shall revert to her children, to be shared by them each and each alike; if either of my said sisters shall die childless, the income belonging to her I direct shall revert to the said sisters surviving, to be shared equally between them. At the decease of all my three said sisters, I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever.'"

The three life tenants survived the testator. Louisa never had any child; Martha Hutchison had one child; Mary A. Sweetser had one child, a son, Elbridge L. Sweetser. He and the child of Martha were born in the lifetime of the testator. Mary A. Sweetser survived her sisters, leaving her son and niece surviving her,

This bill was brought February 1, 1901, to determine who was entitled to receive Elbridge L. Sweetser's half of the fund, whether his assignees in bankruptcy, appointed in proceedings instituted by him in 1878, by voluntary petition in bankruptcy in the District Court of the United States for the District of Massachusetts, or the plaintiff in error, who claims under an equitable attachment made in 1881, as hereafter stated, and an assignment made in October, 1885, to secure two debts incurred after Sweetser's

bankruptcy. There are other defendants besides the plaintiff in error, but their rights are not before us.

The facts are stipulated, and the most pertinent are the following:

On February 23, 1878, Elbridge L. Sweetser filed a voluntary petition in bankruptcy in the District Court of the United States, District of Massachusetts, and was on that day adjudged a bankrupt. On the 16th of March, 1878, William B. H. Dowse and Horace P. Biddle were appointed the assignees of his estate, and there was duly conveyed to them all the estate which the bankrupt owned or was entitled to on February 23, 1878.

During the year 1878 claims amounting to $13,940.47 were proved against the estate. No other claims have since been proved.

The only assets disclosed by Sweetser in his schedules consisted of a stock of goods subject to mortgage. The proceeds of these goods were consumed in paying the mortgage and certain expenses of the assignees, and the balance, of about $280, was paid to the assignees on account of services.

The Florence Machine Company, in 1881, filed a bill in equity against Elbridge L. Sweetser and Solon O. Richardson, then the sole trustee of Solon O. Richardson, deceased, to reach and apply in payment of five notes held by that company against Sweetser, his equitable interest under the will of said deceased. The suit was brought under the provision of General Statutes of Massachusetts, c. 113, sec. 2, and is called equity suit No. 386. Subpœna was issued November 28, 1881, and served on Sweetser and Richardson, trustee, November 29, 1881. Sweetser filed an answer February 1, 1882, in which, among other things, he denied that he had any such interest under the will as could be reached and applied to the payment of the claim of the company, and also denied the validity of the claim, but did not deny making the notes. On the same date Solon O. Richardson, trustee, also filed an answer, setting up the proceedings in bankruptcy and the appointment of assignees, and suggested that any interest that Sweetzer had in the fund passed to them. The suit is still pending, no hearing upon the merits having ever been had.

In 1882 the assignees filed a bill in equity against Sweetzer and Solon O. Richardson, then the sole trustee under the will of said Solon O. Richardson, in the United States District Court, alleging an interest in Sweetser in the fund, that it had accrued before the bankruptcy, but was not set forth in his schedule of property, and that they had no knowledge of such interest until a few days before filing the bill. The bill prayed, among other things, "that the said Elbridge L. Sweetser might be directed to execute and deliver such instruments as would convey to said assignees all of his interest as legatee under the said will, and that the said trustee,

Solon O. Richardson, might be enjoined from paying to the said Elbridge L. Sweetser, or any person or persons claiming under him, any part of the said trust fund, or the income thereof, which might accrue and become payable to the said Elbridge L. Sweetser."

On November 15, 1882, the Florence Machine Company, by its attorney, Warren O. Kyle, filed a general replication in suit No. 386.

On December 2, 1882, Sweetser and Solon O. Richardson, trustee, filed general demurrers to the bill. No hearing, however, has ever been had in the case, either upon the demurrers or the merits, and the case is still pending.

On October 24, 1885, Sweetser executed and delivered to the Monitor Oil Stove Company a note for $1,809 and a note to Solon O. Richardson, individually, for the sum of $506.05. As a security for said notes Sweetser gave a written mortgage or assignment, under seal, of all his interest under the will of Solon O. Richardson, deceased, to Richardson and the company. Sweetser's wife signed the notes and mortgage as joint maker. Notice of the mortgage assignment was acknowledged by William Morton, the then trustee under the will. On the same day Sweetser and his wife conveyed to one Sidney P. Brown their interest under the will, subject to the mortgage, and Brown conveyed to Hannah Sweetser. Notice of these conveyances was acknowledged by said trustee William Morton.

On October 24, 1885, the Florence Machine Company brought an action at law in the Superior Court of Suffolk County against Sweetser, in which the then assignees in bankruptcy were summoned as trustees, to recover the sum of $7,620.13, amount due on eight promissory notes which had been proved in his bankruptcy proceedings, and also to recover upon an account based on ledger entries made by the company in 1881. The assignees in bankruptcy were duly served with process, but did not appear, and were defaulted.

On October 26, 1885, in equity suit No. 386, Solon O. Richardson, trustee, filed a further answer, stating that he had resigned as trustee, and that William Morton had been appointed sole trustee and had accepted the trust.

On June 16, 1891, on motion of W. B. H. Dowse, Warren O. Kyle was joined with him as a party plaintiff in the suit of *Dibble et al.* v. *Sweetser*, in the United States District Court, and Daniel G. Walton, the then trustee under the will, was summoned as a defendant. He accepted service July 30, 1891, and on November 4, 1891, filed a general demurrer to the bill.

On April 19, 1893, the Florence Machine Company was dissolved by an act of the legislature, c. 215 of the Acts of 1893.

On August 13, 1894, the Florence Machine Company filed a motion in equity suit No. 386 that Daniel G. Walton, who had become trustee of the trust under the will of Solon O. Richardson, deceased, and the then assignees in bankruptcy, Dowse and Kyle, might be made parties defendant and summoned to answer the plaintiff's bill. Service was made on Walton August 18, 1894, and accepted by the assignees August 30. In September, 1894, Walton's appearance was entered. On May 15, 1899, Hammond, plaintiff in error, having become assignee of the claim in suit, entered his appearance for the plaintiff, and also entered his appearance *pro se*, and filed a motion setting forth the assignment to him of the claim and asking to be permitted to prosecute the suit in his own name.

May, 1899, the assignees filed an answer, alleging upon information and belief that Sweetser had at the time of the assignment in bankruptcy a vested interest in the trust fund under the will of Richardson, and that by the operation of the United States bankruptcy act said interest had been transferred to them.

On February 1, 1901, William W. Whittredge, being then the sole succeeding trustee under said will, filed this suit for instructions. On April 22 he was summoned to appear as party defendant in the case of *Dibble et al.* v. *Sweetser et al.*, in the United States District Court. He accepted service and appeared by counsel June 12, 1901. July 1, 1901, Hammond filed a petition in said case to be made a party. In the petition he alleged, among other things, that the assignees were not entitled to Sweetser's interest as against him as assignee of the Florence Machine Company; among other reasons, because such rights as said assignees had, if any, were barred by the statute of limitations. U. S. Rev. Stat. sec. 5057. Whittredge, trustee, also filed an answer, alleging the pendency of the suit in equity No. 386, brought by the Florence Machine Company, and that his predecessor had been made a party therein; and also alleging that he, Whittredge, had filed this suit for instructions, and also that the right of action of the assignees was barred by the limitations of law.

On February 10, 1904, (the said assignees Dowse and Kyle having disputed the right of said John C. Hammond to be subrogated to the rights of the Florence Machine Company as to the claims proved by said company against the estate in bankruptcy of said Sweetser in 1878, and having petitioned to have said claims expunged,) the United States District Court made a decree in favor of said Hammond.

The decree has since been affirmed by the United States Circuit Court of Appeals. *Dowse et al.* v. *Hammond*, 130 Fed. Rep. 103.

The suit in equity in the United States District Court, brought by the assignees of Sweetser in the first bankruptcy, has been continued from time

to time at the request of the assignees, who have appeared for that purpose at the callings of the docket to await the termination of the life interests in the trust fund.

As already stated, no hearing has been had either upon the said demurrers or upon the merits.

That part of the trust fund held by Whittredge, as trustee, which is the subject matter of this suit, consists of property worth about $18,000.

The Supreme Judicial Court decreed that Sweetser's interest in the fund passed to his assignees in bankruptcy. 189 Mass. 45. And it was decreed that Hammond, as assignee of the Florence Machine Company and as assignee of the Monitor Oil Stove Company, had "no rights in said equitable interest either by reason of the provisions of the United States Revised Statutes, section 5057, or otherwise."

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

A motion is made to dismiss, which, we think, should be denied. Plaintiff in error sets up rights under section 5057, which were adjudged against him. The court said:

"The defendant Hammond admits that when the testator died Elbridge had either a vested remainder in one-half of the trust fund of $25,000 subject to the life estates created by this item of the will, and subject to the class being opened on the birth of further child or children of the life tenants, or a vested interest in a contingent remainder, and that 'in either case' his interest was 'assignable'

"His contention, however, is that the assignees are barred by U. S. Rev. Sts. s. 5057."

The court decided against the contention, and decided, besides, that "the title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder," and that "the ownership drew after it the possession," which has continued ever since, "and all persons are barred by U. S. Rev. Sts. s. 5057 from controverting it." In other words, the court decided that section 5057 did not preclude the assignees from asserting rights against plaintiff in error, but precluded him from asserting rights against them. Defendants in error, however, urge that the court's decision resulted from facts found or admitted and from general principles of law, and "there remained in the case no question as to any title, right, privilege or immunity under a statute of the United States; and that the court expressly declined to choose 'between the opinion in *Dushane* v. *Beale*, 161 U. S. 513, and the decision in *Rock* v. *Dennett*, 165 Mass. 500.'" But rights under a statute of the United

States were claimed by plaintiff in error and that statute was referred to by the Supreme Judicial Court and was an element in its decision. We think also that the decree rendered was final for the purposes of this writ of error. We therefore overrule the motion to dismiss and go to the merits.

On the merits nine errors are assigned, but plaintiff in error asserts that the questions really involved are only four, namely: Had Sweester such "amount of title" in the trust fund that the Florence Machine Company could make an equitable attachment? Did section 5057 render it necessary for the assignees to intervene and contest the attachment within two years? If not within two years, then within a reasonable time? Was the machine company, in November, 1881, barred by section 5057 from bringing the attachment suit?

Section 5044 of the Revised Statutes required the register in bankruptcy to transfer by instruments under his hand all of the estate of the bankrupt. The assignment related back to the commencement of the proceedings, and operated to vest the title in the assignee. Section 5046, in most comprehensive terms, vested in the assignees all rights in equity and choses in action which the bankrupt had, and 5047 all of his remedies. Section 5057 reads as follows:

"No suit either at law or in equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee unless brought within two years from the time when the cause of action accrues for or against such assignee."

Under these provisions the contention of plaintiff in error is, that, notwithstanding the bankruptcy and the broad language of the sections referred to, Sweetser had an interest in the trust fund that could be assigned or attached, and in such way a title could be acquired good against all the world except the assignees, and good against the assignees by their inaction within the time prescribed by section 5057 or by their abandonment. Applying this principle plaintiff in error contends that "three years having elapsed without anything having been done by the assignees in the way of disposing of this equitable asset, the bankrupt, in November, 1881, had such an amount of title that he could have brought a suit against the trustees under the will to obtain his share, assuming that the contingency had then happened upon which the right to a distribution depended." And that Sweetser, having such title, it followed, it is contended, that the Florence Machine Company, a subsequent creditor, could make an equitable attachment and make it incumbent upon the assignees to assert their rights within two years, in accordance with section 5057. The Supreme Judicial Court met this contention by the effect of the local law. The court said:

"The title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder. In this Commonwealth notice to the trustees is not necessary to complete the title of an assignee of an interest in the property held in trust by them. *Thayer* v. *Daniels*, 113 Mass. 129, and cases there cited. See also *Putnam* v. *Story*, 132 Mass. 205; *Butterfield* v. *Reed*, 160 Mass. 362. By virtue of the assignment in bankruptcy, the complete ownership in this incorporeal interest in this personal property became vested in the assignees, and the ownership drew after it possession, so far as the interest here in question (an incorporeal interest because an interest in remainder) is capable of possession. This result is not affected by the fact that the assignees were for a time ignorant of the existence of this property of the bankrupt. This ownership and possession in the assignees has continued ever since, and all persons are barred by U. S. Rev. Sts. s. 5057, from controverting it. The contention that one in possession of property is barred from exercising the rights, which that ownership confers on the owner, by not having brought an action, is groundless. Under these circumstances we have not found it necessary to choose between the opinion in *Dushane* v. *Beale*, 161 U. S. 513, and the decision in *Rock* v. *Dennett*, 155 Mass. 500."

The cases referred to are antagonistic in their construction of section 5057. In *Rock* v. *Dennett* it was held that the limitations expressed by that section applied to adverse claims arising after the assignment in respect to property vested in the assignee.

In *Dushane* v. *Beale* the court said: "That limitation [sec. 5057] is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee to which adverse claims existed while in the hands of the bankrupt and before assignment."

Defendant in error contends for the construction expressed in *Rock* v. *Dennett* against that expressed in *Dushane* v. *Beale*, and insists that the latter case does not overrule prior cases upon which *Rock* v. *Dennett* was based. We will not stop to reconcile *Dushane* v. *Beale* with prior cases. It is a later utterance by this court, and disposes of the contention of plaintiff in error based on section 5057.

The Supreme Judicial Court also found adversely to plaintiff in error's contention that the assignees had abandoned the property. The court said: "The only other contention made by the defendant Hammond is equally groundless, to wit, that the assignees abandoned this property. The contention is put on the ground that they did not sell their interest in remainder in this fund. Were that all that appeared the argument would be without merit. But that is not all." And, referring to the suit brought by the assignees in the District Court in 1882, said further: "This bill apparently was brought by the assignees as soon as they learned of the existence of the fund and of the fact that creditors of Elbridge were

seeking to reach and apply this interest of Elbridge in satisfaction of the debt due from him to them. The bringing of this bill (which seems to have been a bill in the nature of a bill *quia timet*) disposes of the contention that it was in fact the intention of the assignees to abandon this property."

We think that the record sustains the conclusion of the court.

These views dispose of all the questions in the case.

*Decree affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*